Singham Sulaiman Sdn Bhd v Appraisal Property Management Sdn Bhd & Anor and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS WA-22IP-5–02 OF 2016 AND WA-22IP-31–06 OF 2016
WONG KIAN KHEONG JC
7 MARCH 2018

Tort — Passing off — Real estate services — Effect of s 23 of Valuers and Appraisers Act 1981 — Act amended Valuers and Appraisers Act 1981 and renamed as Valuers, Appraisers and Estate Agents Act 1981 — Whether real estate services passed off — Whether goodwill in business acquired — Whether there was any breach of s 23 — Whether such breach would deprive defendants to defendant themselves against claim — Whether claimant had contractual license or proprietary interest

Jones Lang Wootton started a real estate business as a partnership in London in 1783 ('London firm'). The London firm expanded its real estate business worldwide, including Malaysia, by operating as partnerships within the countries in question. 'LaSalle Partners' originated in the United States of America in 1968. By way of a sale and purchase agreement, Mr Wicks sold his business, name and goodwill in Wicks & Partners to the then partners of Jones, Lang, Wootton, St Helier, Jersey, Channel Islands (Jersey Partners); and Jones, Lang, Wootton, Sydney, Australia (Australian Partners). Clause 5 of the SPA provided that the Jersey and Australian Partners would carry on real estate business under the name and style 'Jones, Lang, Wootton incorporating Wicks & Partners' (Malaysian firm). In 1999, LaSalle Partners acquired Jones Lang Wootton partnerships (except in Malaysia). Thereafter the merged entity is known as Jones Lang LaSalle. The London Proprietors assigned all intellectual property ('IP') rights in, among others, Jones Lang Wootton name and JLW mark, to JLWL. SSSB entered into a 'Global Operating Framework' with JLLPC (GOF). The GOF was later terminated by JLLPC. The first and second suits have been consolidated. The two cases raised the questions of: (a) whether the court should allow SSSB's claim against APM; (b) should JLLP be ordered by the court under s 165 of the Evidence Act 1950 to produce certain documents regarding its holding company; (c) whether the court should exercise its discretion to lift the corporate veil; whether the defendants breached or unlawfully circumvented s 23 of the then VAEA; (d) whether the defendants have passed off their real estate services as SSSB's business by the use of Jones Lang LaSalle name and/or JLL mark; (e) whether SSSB has only a contractual license or a proprietary interest in Jones Lang Wootton name and JLW mark;

(f) whether the defendants were estopped from denying that SSSB had: (i) goodwill attached to SSSB's business regarding JLW Marks; and (ii) a proprietary interest in Jones Lang Wootton name and JLW mark; (g) did SSSB's claim constitute a tort of abuse of court process; and (h) whether SSSB has passed off its real estate services as being associated with the services provided by JLL Group.

Held, allowing SSSB's claim and dismissing JLLP's counterclaim:

(1) Section 20 of the Companies Act 2016 provides that a company is a body corporate with a legal personality. The effect of the general rule is that a company is a legal entity which is distinct from all other companies. The exercise of the court's power regarding piercing/lifting corporate veil should be the same as that for piercing/lifting corporate veil (company vis a vis individual). Both piercing/lifting corporate veil (group of companies) and piercing/lifting corporate veil (company vis a vis individual) constitute exceptions to the general rule. Furthermore, there was nothing in principle or policy to distinguish the exercise of the court's discretion with respect to piercing/lifting corporate veil (companies) and piercing/lifting corporate veil (company vis a vis individual) (see paras 54 & 57).

(2) As the court's power regarding piercing/lifting corporate veil is an exception to the general rule, the wide and less stringent test (merely in the interest of justice or equity) was not able to be applied. An application of a less exacting test will undermine the general rule (see para 57(b)).

(3) In the two cases, SSSB applied to lift and not to pierce the corporate veil of the defendants. SSSB's claim did not seek to impose liability on JLLPC or any company other than the defendants ('the first suit'). The two conditions have been fulfilled for the court to lift the corporate veil of the defendants to show that their alter ego was JLLPC (see paras 58–59).

(4) It was clear that under s 23 of the Valuers and Appraisers Act 1981 ('the VAA'): (a) for partnerships providing services as valuers and appraisers: (i) all the partners must be registered with the Board as registered valuers/appraisers; and (ii) all the shares in the partnerships must be owned by registered valuers/appraisers; and (b) for companies providing services as valuers and appraisers: (i) all the directors must be registered with the Board as registered valuers/appraisers; and (ii) all the shares in the companies must be owned by registered valuers/appraisers (see para 62).

(5) With the introduction of the VAA, by reason of s 23 of the VAA, the Malaysian firm could not offer services as valuers and appraisers. This was because firstly, not all the partners of the Malaysian firm could be

registered with the Board as registered valuers/appraisers. Secondly, all the shares in the Malaysian firm were not owned by registered valuers/appraisers. JLLP has been registered with the Board regarding the provision of estate agency services while AHCM has been approved by the Board as JLLP's Approved Holding Company. AHCM Documents, especially SAP loan agreement, should have been disclosed to the Board. JLLP had therefore concealed the AHCM documents from the Board. As SD4 had signed SAP loan agreement, as AHCM's director, and JLLP's letter, SD4 had committed or contributed to JLLP's breach within the meaning of s 23(4A)(d) of the then VAEA (see paras 63, 69 & 71–72).

(6) A defendant misrepresents the defendant's mark in respect of the defendant's goods/services if the use of the defendant's mark is likely to deceive or confuse the public between the goods/services of the defendant and plaintiff. There was a likelihood of deception/confusion between Jones Lang Wootton name and Jones Lang name on the one part and Jones Lang LaSalle name on the other part. SSSB and the defendants were in the same real estate business except that SSSB also provided valuation services. As such, the clients and prospective clients of SSSB and the defendants were similar and would likely to be deceived or confused. A visual comparison showed there were two striking similarities between Jones Lang Wootton name mark and Jones Lang LaSalle name mark — the first two names ('Jones' and 'Lang') in both marks were identical and were in the same sequence; and as between Jones Lang name and Jones Lang LaSalle name, the likelihood of deception/confusion was higher. A reasonable consumer of real estate services was likely to be deceived or confused into believing that Jones Lang name was an abbreviation for Jones Lang LaSalle name (see paras 83–84).

(7) Illegality did not deprive the defendants of their right to defend themselves against SSSB's claim. Under art 8(1) of the Federal Constitution, all litigants, including a defendant, has a constitutional right of equality before the law and are entitled to equal protection of the law. Such a constitutional right includes a right of the defendant to oppose a claim on its merits. This right could not be denied merely because a defendant committed an illegality. SSSB had the legal burden under s 101(1) and (2) of the EA to prove SSSB's claim. This burden could not be discharged by the illegality; and if a defence is rejected merely because the defendant is involved in an illegality, this may unjustly enriched the plaintiff and may financially wreck the defendant in an unjust manner (see para 94).

[Bahasa Malaysia summary

Jones Lang Wootton memulakan perniagaan hartanah sebagai satu perkongsian di London pada tahun 1783 ('firma London'). Firma London

memperluaskan perniagaan hartanahnya di seluruh dunia, termasuk Malaysia, dengan beroperasi sebagai perkongsian di dalam negara yang dipertikaikan. 'LaSalle Partners' berasal dari Amerika Syarikat pada tahun 1968. Melalui perjanjian jual beli, Wicks menjual perniagaan, nama dan nama baiknya dalam Wicks & Partners kepada rakan-rakan Jones, Lang, Wootton, St Helier , Jersey, Channel Island ('Jersey Partners'); dan Jones, Lang, Wootton, Sydney, Australia ('rakan kongsi Australia'). Fasal 5 memperuntukkan bahawa Jersey dan rakan kongsi Australia akan menjalankan perniagaan hartanah dengan nama dan gaya 'Jones, Lang, Wootton menggabungkan Wicks & Partners' ('firma Malaysia'). Pada tahun 1999, LaSalle Partners memperoleh perkongsian Jones Lang Wootton (kecuali di Malaysia). Berikutan itu, entiti yang digabungkan dikenali sebagai Jones Lang LaSalle. Pemilik London memerintahkan semua hak harta intelek ('IP') dalam, antara lain, nama Jones Lang Wootton dan tanda JLW, kepada JLWL. SSSB memasuki 'Rangka Kerja Operasi Global' dengan JLLPC ('GOF'). GOF kemudiannya ditamatkan oleh JLLPC. Saman pertama dan kedua digabungkan. Kedua-dua kes ini menimbulkan persoalan: (a) sama ada mahkamah membenarkan tuntutan SSSB terhadap APM; (b) sama ada JLLP patut diperintahkan oleh mahkamah bawah s 165 Akta Keterangan 1950 untuk mengemukakan dokumen tertentu mengenai syarikat induknya; (c) sama ada mahkamah harus menjalankan budi bicara untuk menyingkap tabir korporat; sama ada defendan melanggar atau menyalahi s 23 VAEA ketika itu; (d) sama ada defendan telah mengelirupakan perkhidmatan hartanah mereka sebagai perniagaan SSSB dengan menggunakan nama Jones Lang LaSalle dan/atau tanda JLL; (e) sama ada SSSB hanya mempunyai lesen kontrak atau kepentingan pemilik dalam nama Jones Lang Wootton dan tanda JLW; (f) sama ada defendan diestop daripada menafikan bahawa SSSB mempunyai: (i) nama baik yang terpamer pada perniagaan SSSB bagi tanda JLW; dan (ii) kepentingan pemilik dalam nama Jones Lang Wootton dan tanda JLW; (g) tuntutan SSSB merupakan satu tort salah guna proses mahkamah; dan (h) sama ada SSSB telah mengelirupakan perkhidmatan hartanahnya sebagai berkaitan dengan perkhidmatan oleh kumpulan JLL.

Diputuskan, membenarkan tuntutan SSSB dan menolak tuntutan balas JLLP:

(1) Seksyen 20 Akta Syarikat 2016 memperuntukkan bahawa syarikat adalah sebuah badan korporat dengan keperibadian undang-undang. Kesan Peraturan Am ialah syarikat adalah entiti undang-undang yang berbeza dengan semua syarikat lain. Penjalanan kuasa mahkamah mengenai membuka/menyingkap tirai korporat sepatutnya sama seperti membuka/menyingkap tirai korporat (syarikat dengan individu). Kedua-dua pembukaan/penyingkapan tirai korporat (kumpulan syarikat) dan pembukaan/penyingkapan tirai korporat (syarikat dengan individu) merupakan pengecualian kepada peraturan umum. Selain itu,

tidak ada prinsip atau dasar untuk membezakan penentuan budi bicara mahkamah berkenaan dengan pembukaan/penyingkapan tirai korporat (syarikat) dan pembukaan/penyingkapan tirai korporat (syarikat dengan individu) (lihat perenggan 54 & 57).

(2) Memandangkan kuasa mahkamah mengenai pembukaan/penyingkapan tirai korporat adalah pengecualian terhadap peraturan umum, ujian luas dan kurang ketat (semata-mata demi kepentingan keadilan atau ekuiti) tidak dapat diguna pakai. Pemakaian ujian yang kurang tepat akan menjejaskan peraturan umum (lihat perenggan 57(b)).

(3) Dalam kedua-dua kes ini, SSSB memohon untuk menyingkap dan tidak membuka tirai korporat defendan. Tuntutan SSSB tidak bertujuan meletakkan liabiliti pada JLLPC atau mana-mana syarikat selain defendan. Kedua-dua syarat telah dipenuhi untuk mahkamah menyingkap tirai defendan untuk menunjukkan alter ego mereka adalah JLLPC (lihat perenggan 58–59).

(4) Jelas bahawa di bawah s 23 Akta Penilai dan Pentaksir 1981 ('APP'): (a) untuk perkongsian yang menyediakan perkhidmatan sebagai penilai dan pentaksir: (i) semua rakan kongsi mesti didaftarkan dengan Lembaga sebagai penilai/pentaksir berdaftar; dan (ii) semua saham dalam perkongsian itu mesti dimiliki oleh penilai/pentaksir berdaftar; (b) untuk syarikat yang menyediakan perkhidmatan penilai dan pentaksir: (i) kesemua pengarah harus didaftrkan dengan Lembaga sebagai penilai/pentaksir berdaftar; dan (ii) semua saham dalam syarikat harus dimiliki oleh (lihat perenggan 62).

(5) Dengan pengenalan APP, melalui s 23 APP, firma Malaysia tidak dapat menawarkan perkhidmatan sebagai pentaksir dan penilai. Ini kerana, pertama, tidak semua rakan kongsi firma Malaysia boleh didaftarkan dengan Lembaga sebagai pentaksir/penilai berdaftar. Kedua, semua saham di firma Malaysia tidak dimiliki oleh pentaksir/penilai berdaftar. JLLP telah berdaftar dengan Lembaga bagi perkhidmatan agensi estet manakala AHCM telah diluluskan oleh Lembaga Pengarah sebagai Syarikat pegangan JLLP. Dokumen AHCM, terutamanya perjanjian pinjaman SAP, sepatutnya telah didedahkan kepada Lembaga Pengarah. Oleh itu, JLLP menyembunyikan dokumen-dokumen AHCM dari Lembaga Pengarah. Memandangkan SD4 telah menandatangani perjanjian pinjaman SAP, sebagai pengarah AHCM, dan surat JLLP, SD4 telah melakukan atau menyumbang kepada pelanggaran JLLP dalam pengertian s 23(4A)(d) VAEA (lihat perenggan 63, 69 & 71–72).

(6) Seorang defendan memberi pewakilan salah tanda defendan berkenaan barang/perkhidmatan defendan jika penggunaan tanda defendan itu mungkin menipu atau mengelirukan orang awam antara barangan/perkhidmatan defendan dan plaintif. Terdapat kemungkinan

penipuan/kekeliruan antara nama Jones Lang Wootton dan nama Jones Lang di satu bahagian dan nama Jones Lang LaSalle di bahagian lain. SSSB dan defendan berada dalam perniagaan hartanah yang sama kecuali SSSB juga menyediakan perkhidmatan penilaian. Oleh itu, pelanggan dan bakal pelanggan SSSB dan defendan adalah sama dan mungkin akan tertipu atau keliru. Perbandingan visual menunjukkan terdapat dua persamaan ketara antara tanda nama Jones Lang Wootton dan tanda nama Jones Lang LaSalle — dua nama pertama ('Jones' dan 'Lang') dalam kedua-dua tanda adalah sama dan berada dalam urutan yang sama; dan antara nama Jones Lang dan nama Jones Lang LaSalle, kemungkinan penipuan/kekeliruan lebih tinggi. Pengguna munasabah perkhidmatan hartanah mungkin tertipu atau keliru dengan mempercayai bahawa nama Jones Lang adalah singkatan bagi nama Jones Lang LaSalle (lihat perenggan 83–84).

(7) Ketaksahan tidak defendan-defendan akan hak mereka untuk membela diri terhadap dakwaan SSSB. Di bawah perkara 8(1) Perlembagaan Persekutuan, semua litigan, termasuk defendan, mempunyai hak perlembagaan yang sama di bawah undang-undang dan berhak mendapat perlindungan undang-undang yang sama. Hak perlembagaan seperti itu termasuk hak defendan untuk membantah tuntutan atas meritnya. Hak ini tidak dapat dinafikan semata-mata kerana seorang defendan melakukan satu penyalahgunaan. SSSB mempunyai beban undang-undang di bawah s 101(1) dan (2) AK untuk membuktikan tuntutan SSSB. Beban ini tidak dapat dilepaskan oleh pihak yang tidak sah; dan jika pembelaan ditolak semata-mata kerana defendan terlibat dalam suatu penyalahgunaan, ini boleh secara tidak adil memperkayakan plaintif dan boleh menghancurkan kewangan defendan dengan cara tidak adil (lihat perenggan 94).]

Notes

For cases on passing off in general, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2335–2385.

Cases referred to

Atlas Maritime Co SA v Avalon Maritime Ltd; The Coral Rose (No 1) [1991] 4 All ER 769, CA (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

CDL Hotels International Ltd v Pontiac Marina Pte Ltd [1998] 2 SLR 550, CA (refd)

Chanel v Melwani2 International Sdn Bhd & Ors and other suits [2017] 10 MLJ 592, HC (refd)

A *Chiew Lip Seng v Perwira Habib Bank (M) Bhd* [1999] 1 MLJ 310, HC (refd)
Colliers International Property Consultants Inc v Colliers International Property Consultants Sdn Bhd [2015] MLJU 2348; [2015] 1 LNS 252, HC (refd)
Dato Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong [1986] 2 MLJ 112, SC (refd)
B *Dawama Sdn Bhd v Mohd Fadel bin Yusof & Ors* [2015] 7 MLJ 1, HC (refd)
Doretti Resources Sdn Bhd v Fitters Marketing Sdn Bhd & Ors [2017] MLJU 836; [2017] 5 MLRH 1, HC (refd)
Erven Warnink Besloten Vennootschap And Another v J Townend & Sons (hull) Ltd And Another [1979] AC 731, HL (refd)
C *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449; [2015] 9 CLJ 537, FC (refd)
Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)
Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on
D *their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773, FC (refd)
Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (refd)
E *Guy Neale and others v Ku De Ta SG Pte Ltd* [2015] 4 SLR 283, CA (refd)
Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener) [2015] 4 MLJ 166; [2015] 4 CLJ 20, FC (refd)
Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 (not folld)
F *Hyundai Motor Company v Sun Yuen Rubber Manufacturing Co Sdn Bhd* [2017] MLJU 700, HC (refd)
Lam Soon (M) Bhd v Forward Supreme Sdn Bhd & Ors [2001] 6 MLJ 651, HC (refd)
Lego Systems A/S v Lego M Lemelstrich [1983] FSR 155, Ch D (refd)
G *Maestro Swiss Chocolate Sdn Bhd & Ors v Chocosuisse Union Des Fabricants Suisses De Chocolat (a co-operative society formed under title XXIX of the Swiss Code of Obligations) & Ors and another appeal* [2016] 2 MLJ 359, FC (refd)
Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585; [2005] 2 CLJ 596, CA (refd)
H *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR 1058, CA (refd)
Munusamy v Public Prosecutor [1987] 1 MLJ 492, SC (refd)
Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others [2011] 1 AC 662, SC (not folld)
Palaniappa Chettiar v Arunasalam Chettiar [1962] 1 MLJ 143, PC (refd)
I *Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)

Paramill Sdn Bhd & Anor v Datuk Joseph Pairin Kitingan [2007] 7 MLJ 289, CA (refd)
Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors [1995] 4 MLJ 764; [1995] 4 CLJ 606, HC (refd)
Public Prosecutor v Kau Joo Huat [1988] 2 MLJ 91, SC (refd)
Public Prosecutor v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Reckitt and Colman Products Ltd v Borden Inc and others [1990] 1 All ER 873, HL (folld)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)
Scandecor Development AB v Scandecor Marketing AB and another [1998] All ER (D) 370; [1999] FSR 26, CA (refd)
Scandecor Development AB v Scandecor Marketing AB and others [2001] All ER (D) 29 (Apr), HL (refd)
Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 2 MLJ 770; [1994] 3 CLJ 7, SC (refd)
Sinma Medical Products (M) Sdn Bhd v Yomeishu Seizo Co Ltd & Ors [2004] 4 MLJ 358; [2004] 3 CLJ 815, CA (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)
Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)
Stanley v Phillips [1966] HCA 24; [1966] 115 CLR 470, HC (refd)
Star Industrial Company Ltd v Yap Kwee Kor Trading As New Star Industrial Company [1976] 1 MLJ 149, PC (refd)
Starbucks (HK) Ltd and another v British Sky Broadcasting Group plc and others [2015] 3 All ER 469, SC (refd)
Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc and another and another appeal [2014] 1 SLR 911, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tan Guan Eng & Anor v Ng Kweng Hee & Ors [1992] 1 MLJ 487, HC (not folld)
Teng Boon How v Pendakwa Raya [1993] 3 MLJ 553, SC (refd)
The Commissioners of Inland Revenue v Muller & Co's Margarine, Limited [1901] AC 217, HL (refd)
The Scotch Whisky Association & Anor v Ewein Winery (M) Sdn Bhd [1999] 6 MLJ 280, HC (refd)
Tokai Corporation v DKSH Malaysia Sdn Bhd [2016] MLJU 621, HC (refd)
Unilever plc v The Procter & Gamble Co [2001] 1 All ER 783, CA (not folld)
Warner-Lambert Co v Glaxo Laboratories Ltd [1975] RPC 354, CA (refd)

Yong Sze Fun & Anor (t/a Perindustrian Makanan & Minuman Layang-Layang) v Syarikat Zamani Hj Tamin Sdn Bhd & Anor [2012] 1 MLJ 585, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 169(16), Form 32A
Companies Act 2016 ss 4(1), (2), (3), (4), 6(a), (b), 7(a), (b), (c), 20, 213(1)
Evidence Act 1950 ss 3, 5, 8(1), 17(1), 18(1), (3)(a), (3)(b), 19, 20, 23, 101(1), (2), 114(g), 132, 145(1), (2), 155(c), 165
Evidence Act [SG] s 167
Federal Constitution arts 5(1), 8(1)
Interpretation Acts 1948 and 1967 ss 2(1)(a), 17A, Part 1
Rules of Court 2012 O 24, O 24 rr 3, 7, O 34 r 2(2)(k), O 59 rr 8(b), 14(1), 16(1), (1)(a), (1)(b), (1)(c), (1)(e), (2), (3), 19(1)
Trade Marks Act 1976 ss 3(2)(a), (2)(c), 36, 37, 37(a), (b), (c), 45(1)(a), Form TM7
Trade Marks Act 1994 [UK]
Valuers and Appraisers Act 1981 ss 2, 10(b), 16, 19, 23
Valuers, Appraisers and Estate Agents Act 1981 ss 2, 10(i), 23, 23(1), (2)(b)(iv)(A), (2)(b)(iv)(B), (2)(b)(iv)(C), (4A), (4A)(a), (4A)(b), (4A)(c), (4A)(d), (4A)(e), 24(1)(i), (1)(ii), (1)(iii), (1)(iv), (1)(v), (1)(vi), (1A), Part 6
Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ss 23, 24, 27(1)(c), 29
Valuers, Appraisers and Estate Agents Rules 1986 rr 131, 132, 133, 134, 135, 136, 137, 138

Gopal Ram (Lua Ai Siew, Lim Choon Khim, Chin Yan Leng and David Yii Hee Kiet with him) (Soo Thien Ming & Nashrah) for the plaintiff.
Chew Kerk Ying (Elaine Yap Chin Gaik and Chong Tze Lin with her) (Wong & Partners) for the defendants.

Wong Kian Kheong JC:

A. INTRODUCTION

[1] This judgment concerns the tort of passing off (and counter passing off) regarding real estate services and the effect of s 23 of the then Valuers and Appraisers Act 1981 ('the VAA'). In 1984, Parliament amended and renamed VAA as Valuers, Appraisers and Estate Agents Act 1981 ('the VAEA'). With effect from 2 January 2018, Parliament has further amended and renamed VAEA as Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ('the VAEAPM').

[2] In Civil Suit No WA-221P-5–02 of 2016 ('first suit'):

(a) Singham Sulaiman Sdn Bhd ('SSSB') uses the following trademarks ('JLW marks') in its real estate business:

(i) 'Jones Lang Wootton' name;

(ii) Jones Lang Wootton composite mark has been registered by SSSB in the Register of Trade Marks ('Register') for services in Class 36 ('Jones Lang Wootton registered trademark'). A copy of Jones Lang Wootton registered trademark is annexed to this judgment as Annexure A;

(iii) 'Jones Lang' name; and

(iv) 'JLW' mark;

(b) SSSB claims that Appraisal Property Management Sdn Bhd ('APM') and JLL Property Services (M) Sdn Bhd ('JLLP') have committed the tort of passing off their real estate services as SSSB's business ('SSSB's claim') by the use of the following marks:

(i) 'Jones Lang LaSalle' name; and

(ii) 'JLL' mark. Jones Lang LaSalle IP Incorporated ('JLL IP Inc') has registered JLL Mark with the Registrar of Trade Marks ('Registrar') in classes 36, 37 and 42 ('JLL registered trademarks'). One of JLL registered trademarks is annexed hereto as Annexure B.

In this judgment, APM and JLLP will be referred collectively as 'the defendants (first suit)'; and

(c) JLLP counterclaims against SSSB ('JLLP's counterclaim') based on the tort of passing off, namely SSSB has passed off its real estate services as being associated with the services offered by Jones Lang LaSalle group of companies ('JLL Group').

[3] In the second case, Civil Suit No WA-221P-31–06 of 2016 ('second suit'), Jones Lang Wootton Ltd ('JLWL') applied to court under s 45(1)(a) of the Trade Marks Act 1976 ('the TMA') to remove Jones Lang Wootton registered trademark from the Register.

[4] The first and second suits ('two cases') have been consolidated. In this judgment, APM, JLLP and JLWL shall be referred collectively as 'the defendants (two cases)'.

B. ISSUES

[5] The two cases raise the following questions:

(a) whether the court should allow SSSB's claim against APM:

(i) due to APM's failure to call any witness to rebut evidence in support of SSSB's claim; and/or

(ii) by drawing an adverse inference against APM under s 114(g) of the Evidence Act 1950 ('the EA');

(b) should JLLP be ordered by the court under s 165 of the EA to produce certain documents regarding its holding company, AHCM Holdings Sdn Bhd ('AHCM')?

(c) whether an email dated 14 October 2015 ('email dated 14 October 2015') from Mr Chris Fossick ('Mr Fossick') (sent on behalf of Jones Lang LaSalle Property Consultants Pte Ltd ('JLLPC')) to Mr Navaneethasingam a/l Ratnasingham ('SP1') (from SSSB) is admissible as evidence when the email dated 14 October 2015 has been made during 'without prejudice' negotiations. This issue discusses the scope of ss 17(1) and 23 of the EA;

(d) whether the court should exercise its discretion to lift the corporate veil to reveal that:

(i) JLLPC is the 'alter ego' of the defendants (two cases); and

(ii) all the relevant companies in JLL Group ('relevant JLL companies') have acted as a single entity ('JLL Group') in the two cases;

(e) have the defendants (first suit) breached or unlawfully circumvented s 23 of the then VAEA?

(f) whether the defendants (first suit) have passed off their real estate services as SSSB's business (by the use of Jones Lang LaSalle name and/or JLL mark). In this regard:

(i) has SSSB acquired goodwill in its business regarding JLW Marks to enable it to sue for the tort of passing off? and

(ii) whether any breach of s 23 of the VAEA would deprive the defendants (first suit) of their right to defend themselves against SSSB's claim;

(g) whether SSSB has only a contractual license or a proprietary interest in Jones Lang Wootton name and JLW mark;

(h) whether the defendants (two cases) are estopped from denying that SSSB has:

(i) goodwill attached to SSSB's business regarding JLW Marks; and

(ii) a proprietary interest in Jones Lang Wootton name and JLW mark;

(i) does SSSB's claim constitute a tort of abuse of court process?

(j) whether SSSB has passed off its real estate services as being associated with the services provided by JLL Group;

(k) regarding the second suit:

(i) is JLWL 'aggrieved' by Jones Lang Wootton registered trademark and is therefore entitled to apply to court under s 45(1)(a) of the TMA to expunge Jones Lang Wootton registered trademark from the Register? and

(ii) if JLWL is aggrieved by Jones Lang Wootton registered trademark, whether Jones Lang Wootton registered trademark has been registered by way of fraud on the registrar? and

(l) regarding costs to be awarded in the two cases, should the court certify fees for two counsel pursuant to O 59 r 14(1) of the Rules of Court 2012 ('the RC')?

C. BACKGROUND

[6] Jones Lang Wootton started real estate business as a partnership in London in 1783 ('London firm'). The London firm expanded its real estate business worldwide, including Malaysia, by operating as partnerships within the countries in question.

[7] 'LaSalle Partners' originated in the United States of America ('USA') in 1968.

[8] Mr William George Wicks ('Mr Wicks') carried on business as Chartered Surveyors, Valuers and Property Manager in Kuala Lumpur under the name and style 'Wicks & Partners'. By way of a sale and purchase agreement dated 8 October 1974 ('SPA (1974)'), Mr Wicks sold his business, name and goodwill in Wicks & Partners to the then partners of:

(a) 'Jones, Lang, Wootton, St Helier, Jersey, Channel Islands' ('Jersey Partners'); and

A (b) 'Jones, Lang, Wootton, Sydney, Australia' ('Australian Partners').

Clause 5 of the SPA (1974) provided that the Jersey and Australian Partners would carry on real estate business under the name and style 'Jones, Lang, Wootton incorporating Wicks & Partners' ('Malaysian firm').

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[9] A partnership agreement regarding the Malaysian firm was entered into on 1 March 1977 ('partnership agreement (1977)'). According to the partnership agreement (1977):

(a) cl 25 provided that the 'name and style of JONES, LANG, C WOOTTON is the property of the [London Firm] and that the carrying on of [the Malaysian Firm] under such style is by license' of the London firm; and

(b) cl 26 stated that the Malaysian firm shall execute an irrevocable power of attorney ('PA') in favour of the Australian partners to execute 'as and D when necessary' the relevant form for the change of the name of the Malaysian firm. Such a PA had been granted by SP1 on 1 March 1977 ('PA (1977)'). The second recital to the PA (1977) reiterated cl 25 of the partnership agreement (1977).

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[10] On 8 June 1979, the partners of the Malaysian firm signed a partnership agreement with Encik Sulaiman bin Mustafa ('Encik Sulaiman') to admit Encik Sulaiman as a new partner in the Malaysian firm ('partnership agreement (1979)'). Clauses 24 and 25 of the partnership agreement (1979) are similar to F cll 25 and 26 respectively of the partnership agreement (1977). Pursuant to cl 25 of the partnership agreement (1979), Encik Sulaiman granted an irrevocable PA on 15 August 1979 ('PA (1979)'). The second recital to the PA (1979) repeated cl 24 of partnership agreement (1979).

G **[11]** The VAA came into force on 6 February 1981. Initially, the VAA only required the registration of valuers and appraisers by the Board of Valuers and Appraisers ('Board'). At its inception, the VAA did not require estate agents to be registered with the Board. I will discuss the effect of s 23 of the VAA in Part I below.

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[12] On 19 May 1982, a deed of license ('License (1982)') was entered into by the then proprietary partners of the London firm ('London Proprietors') and Australian Partners whose names were listed in Part 2 of the First Schedule to the License (1982) ('Pacific Proprietors'). In cl 1 of the License (1982), the I London Proprietors gave a licence to the Pacific Proprietors to licence and supervise on behalf of the London Proprietors, the use of the Jones Lang

Wootton name and JLW mark in six countries (including Malaysia). A

[13] The following agreements, among others, were executed on 1 September 1982:

(a) a sale and purchase agreement wherein SSSB purchased the interest of the Australian Partners in the Malaysian firm ('first SPA (1982)']. In cl 9 of the first SPA (1982), the Australian Partners and SSSB agreed that the first SPA (1982) did not confer on SSSB any title, right or interest in Jones Lang Wootton name or JLW mark which shall remain the property of the London Proprietors; B C

(b) a sale and purchase agreement wherein SSSB purchased the interest of the Malaysian partners in the Malaysian firm ('second SPA (1982)'). Clause 9 of the second SPA (1982) is similar to cl 9 of the first SPA (1982); D

(c) by a 'Deed of Sub-Licence of Name' ('sublicence (1982)'), the Pacific Proprietors granted an exclusive sublicence to SSSB to use Jones Lang Wootton name and JLW mark for a term expiring on 1 December 1990 or 'such later date as may be mutually agreed'. According to cl 3(a) of the sub-license (1982), SSSB expressly acknowledged that Jones Lang Wootton name and JLW mark were the property of the London Proprietors; and E

(d) a deed of covenant ('covenant (1982)') was entered into by:

(i) SSSB; F

(ii) 'covenantors' (certain individuals (including SP1) whose names were stated in Part 1 of the Schedule to the covenant (1982)');

(iii) 'London Partners' whose names were stated in Part 2 of the Schedule to the covenant (1982); and G

(iv) Pacific Proprietors whose names were stated in Part 3 of the Schedule to the covenant (1982).

Clause 1(a) of the covenant (1982) stated that the covenantors covenanted that the covenantors shall not at any time during the term of the sublicence (1982) for any reason, register or attempt to register in Malaysia Jones Lang Wootton name, JLW mark or any name or style materially or substantially the same, literally or phonetically, in English, Chinese or Malay languages, or any name incorporating any H I

A one or more of the words 'Jones', 'Lang' or 'Wootton'. In cl 1(b)(i) of the covenant (1982), the covenantors agreed, among others, not to accept appointment as directors in any company which uses the Jones Lang Wootton name.

B **[14]** With effect from 7 September 1984, the Valuers and Appraisers (Amendment) Act 1984 (Act A598) amended VAA. Act A598, among others, renamed VAA as VAEA and required the registration of estate agents with the Board. Act A598 also renamed the Board as the Board of Valuers, Appraisers and Estate Agents.
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[15] On 6 July 1993, a deed of sublicence of name ('sublicence (1993)') has been agreed between JLW Pacific Ltd ('JLWP') and SSSB. Clause 6 of sublicence (1993) has provided that, among others, if the license between the
D London Proprietors and the Pacific Proprietors is terminated or is not renewed for any reason, JLWP and its 'assigns or successors shall endeavour' to ensure that a new sublicence is granted to enable SSSB to continue using Jones Lang Wootton name and JLW mark 'on terms no less favourable' to SSSB ('cl 6 sublicence (1993)').
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[16] With effect from 31 January 1997, Valuers, Appraisers and Estate Agents (Amendment) Act 1997 (Act A980) amended VAEA.

F **[17]** In 1999, LaSalle Partners acquired Jones Lang Wootton partnerships (except in Malaysia). Thereafter the merged entity is known as Jones Lang LaSalle.

[18] By a series of assignments dated 8 March 1999, the London Proprietors
G have assigned all Intellectual Property ('IP') rights (including trademarks and goodwill) in, among others, Jones Lang Wootton name and JLW mark, to JLWL.

[19] On 26 February 2002, SSSB entered into a 'Global Operating
H Framework' with JLLPC ('GOF').

[20] On 24 August 2006, SSSB applied to register Jones Lang Wootton registered trademark ('SSSB's trademark application') which was allowed by the Registrar.
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[21] Valuers, Appraisers and Estate Agents (Amendment) Act 2011 (Act A1404) amended VAEA with effect from 19 August 2011.

[22] The GOF was terminated by JLLPC by way of JLLPC's letter dated 17 January 2012 to SSSB ('JLLPC's termination notice'). JLLPC's termination notice gave 12 months' notice of the termination of GOF. GOF was therefore terminated with effect from 18 January 2014.

[23] In 2014, JLL Group undertook a rebranding exercise and is now known only as JLL. JLL Group now uses a JLL composite mark which is annexed hereto as Annexure C.

D. CASE FOR SSSB

[24] SP1 is the Executive Chairman, Managing Director ('MD') and major shareholder of SSSB. SP1 testified, among others, as follows:

(a) SP1 was employed by the Malaysian firm in 1974. In 1976, SP1 became a proprietary partner of the Malaysian firm;

(b) when VAEA was first enforced in 1981, the foreign partners of the Malaysian firm were not qualified for registration with the Board. Hence, SSSB was incorporated;

(c) SSSB purchased the assets, business and goodwill of the Malaysian firm, including the exclusive right to use JLW Marks. Thereafter SSSB provides real estate services based on JLW Marks;

(d) the GOF provided for, among others, 'rules of practice' in Malaysia between SSSB and JLL Group. The GOF was terminated because SSSB alleged that JLLPC had requested for SSSB to act in certain real estate transactions in Malaysia which would be unlawful, unethical and unprofessional ('SSSB's allegations of misconduct');

(e) except for valuation services, the defendants (first suit) provide all the real estate services offered by SSSB. The defendants (first suit) promote themselves as Jones Lang LaSalle. Accordingly, this causes confusion between the real estate services provided by SSSB and the defendants (first suit);

(f) regarding Jones Lang Wootton registered trademark:

(i) SP1 agreed that SSSB did not obtain the written consent of the London Proprietors or JLWP before SSSB's trademark application was filed;

(ii) SP1 was aware that SSSB had an obligation under the covenant (1982) not to register Jones Lang Wootton name as a trademark;

(iii) SP1 disagreed that:

(1) the statutory declaration ('SD') affirmed by Ms Lilian Chee Sooi Hiong in support of SSSB's trademark application ('Ms Chee's SD') stated falsely in para 3 of the SD that SSSB 'is the bona fide proprietor of (Jones Lang Wootton composite mark) ... and is

entitled to be registered as the proprietor' of Jones Lang Wootton composite mark;

(2) SSSB had concealed from the Registrar the fact that SSSB was only a mere licensee of Jones Lang Wootton name and JLW mark; and

(3) Jones Lang Wootton registered trademark had been obtained by SSSB by misrepresentation to the Registrar; and

(iv) SP1 was not aware why row 11 of Form TM5 in SSSB's trademark application ('Form TM5') stated that SSSB's first use of Jones Lang Wootton mark in Malaysia was 1 February 1982. SP1 however testified that when SP1 joined the Malaysian firm in 1974, the Malaysian firm was already using Jones Lang Wootton composite mark. SP1 disagreed that SSSB had misled the Registrar regarding row 11 of Form TM5 (that SSSB was the first user of Jones Lang Wootton composite mark in Malaysia);

(g) with respect to Jones Lang LaSalle name, after the termination of GOF:

(i) SSSB did not issue a public notice to state that it was no longer associated with Jones Lang LaSalle;

(ii) SP1 admitted that there were 'surplus' letters sent by SSSB which stated that SSSB was still in association with Jones Lang LaSalle. Such a practice had however been stopped by SSSB;

(iii) SP1 was not aware of SSSB's business cards which stated that SSSB was in association with Jones Lang LaSalle; and

(iv) SP1 disagreed that SSSB has passed off itself as an associate with Jones Lang LaSalle; and

(h) as regards Jones Lang Wootton Sdn Bhd ('JLWSB'):

(i) SP1 agreed that JLWSB was incorporated on 6 May 1982;

(ii) SP1 denied that he had concealed the incorporation of JLWSB from the Australian Partners and Malaysian partners when SSSB purchased their interest in the Malaysian firm; and

(iii) SP1 denied that there was a breach of cl 1(a) and 1(b)(i) of covenant (1982).

[25] Ms Donna Gay Barnaby ('SP2') is SSSB's senior vice president. According to SP2, among others:

(a) based on SSSB's records, SSSB has spent RM603,065 to market JLW Marks in Malaysia for the period from 1 February 2010–31 January 2015;

(b) there was actual confusion between JLW marks on the one part and Jones Lang LaSalle name and JLL mark on the other part as follows:

(i) Kumpulan Wang Persaraan ('KWAP') subscribed SSSB's quarterly property report, 'Malaysian Quarterly Property Market Report' ('SSSB's property report'). On 20 August 2015, KWAP sent an email to SSSB which erroneously referred SSSB's property report as 'JLL Quarterly PM Report' ('JLLP's property report'). This email also mistakenly addressed SSSB as 'JLL'; and

(ii) Ms Malathi Thevendran, SSSB's director ('Ms Malathi'), gave a presentation at the Asian Strategy & Leadership Institute ('ASLI'). At that ASLl's event, Ms Malathi met one Mr Shan Saeed ('Mr Shan') and gave him her Jones Lang Wootton business card. Mr Shan however sent to Ms Malathi an email dated 25 September 2015 which erroneously referred to JLLP's property report in the subject title;

(c) Jones Lang LaSalle Incorporated ('JLL Inc') is a company listed on the New York Stock Exchange. According to JLL Inc's documents filed with USA's Securities and Exchange Commission ('SEC'), the defendants (two cases), JLLPC and JLL IP Inc are subsidiaries of JLL Inc;

(d) regarding Jones Lang Wootton registered trademark, JLL IP Inc initially objected to SSSB's trademark application. JLL IP Inc did not however file its notice of opposition ('Form TM7') to SSSB's trademark application despite the fact that the registrar had given several extensions of time to JLL IP Inc to file Form TM7. The registration of Jones Lang Wootton registered trademark has been renewed on 4 April 2016 for another ten years; and

(e) SP2 referred to registration of Jones Lang Wootton trademarks in many countries ('Jones Lang Wootton registered trademarks (other countries)') which have expired or have been cancelled.

E. EVIDENCE ADDUCED BY JLLP AND JLWL

[26] APM did not call any witness to resist SSSB's claim. In Part G(1) below I will discuss the effect of APM's failure to adduce evidence in the first suit.

[27] Mr David Lee-Young ('SD1') is employed by Jones Lang LaSalle (NSW) Pty Ltd ('JLL (NSW)'). SD1's designation is 'Chief Operating Officer, Asia Pacific Hotels and Hospitality Group — JLL'. SD1 testified, among others, as follows:

(a) APM, JLLP and JLL NSW are part of JLL Group. During cross-examination, SD1 stated that he was giving evidence for JLL Group; and

A (b) regarding the sublicence (1993):

(i) the sublicence (1993) has not been terminated and is still subsisting; and

B (ii) the sublicence (1993) cannot supercede the covenant (1982) because the parties in the sublicence (1993) are different from the parties in the covenant (1982).

[28] Mr lain Mackenzie ('SD2') is employed by JLLPC as 'Head of Solutions Department — JLL'. According to SD2, among others:

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(a) there was a 'massive re-branding exercise' by JLL Group and by 2014, JLL Group is known as 'JLL'. JLL Group uses only JLL name, JLL composite mark and JLL registered trademarks for its business. There was a 'deliberate move' by JLL Group to stop using Jones Lang LaSalle name for branding;

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(b) regarding the relationship between JLL Group and SSSB:

(i) JLL Group's corporate clients were not happy with SSSB's services;

(ii) SP1 was 'quite litigious' and had threatened to sue JLL Group's corporate clients. In fact, SSSB did enter into litigation with a number of JLL Group's corporate clients;

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(iii) SSSB's fees were 'uncompetitive';

(iv) to protect JLL Group's interest in Malaysia, JLL Group had to:

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(1) engage APM to support JLL Group's corporate clients in Malaysia; and

(2) allow JLL Group's corporate clients to seek business from competitors of JLL Group; and

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(v) SD2 denied SSSB's allegations of misconduct; and

(c) after the termination of the GOF, JLL Group 'expanded directly into Malaysia with the acquisition of (JLLP)'.

H **[29]** Ms Jane Louise Niven ('SD3') is employed by JLLPC. SD3 holds the position as 'Global Compliance Counsel'. SD3 gave the following evidence, among others:

(a) GOF was terminated because JLL Group was 'held to ransom' by SSSB because JLL Group was obliged under the GOF to refer its corporate clients to SSSB even though SSSB provided 'sub-par services';

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(b) after the termination of GOF, no decision was made by JLL Group to terminates SSSB's licence to use Jones Lang Wootton name and JLW mark; and

(c) regarding Jones Lang Wootton registered trademark:

(i) JLL IP Inc considered filing an opposition to SSSB's trademark application but decided not to do so as a business decision. This was because at the material time, SSSB was servicing all of JLL Group's clients in Malaysia and JLL Group's approach was to 'engage' with SSSB to see if an overall business solution could be achieved;

(ii) due to a global rebranding of JLL Group, registrations of Jones Lang Wootton registered trademarks (other countries) were allowed to lapse; and

(iii) as the sublicence (1993) was still subsisting, SSSB was only a licensee of Jones Lang Wootton composite mark. SSSB therefore committed a fraud on the Registrar by dishonestly portraying itself to be the owner of Jones Lang Wootton composite mark.

[30] Ms Lau Yock Yin ('SD4') is JLLP's MD. SD4 gave the following evidence, among others:

(a) SD4 worked as a manager in SSSB for about three years from 1992–1995. SD4 has been in real estate business for more than 25 years;

(b) SD4 started YY Property Solutions as a sole proprietorship in 1995. YY Property Solutions Sdn Bhd ('YYPS') was subsequently incorporated with S04 as its MD. YYPS was the former name of JLLP;

(c) on or around June 2014, JLLPC acquired 49% shareholding in JLLP and JLLP became a part of JLL Group. SD4 sold 49% of shares in JLLP to JLLPC because she wanted to expand JLLP's customer base and to take JLLP's business to 'an international level'. Furthermore, JLLP joined JLL Group to ensure that JLLP's staff receive better training and exposure which will then enhance their skill sets;

(d) by a letter dated 18 February 2014, JLLP had applied for the Board's approval, among others, to:

(i) sell 51% of shares in JLLP to AHCM;

(ii) sell 49% of shares in JLLP to JLLPC;

(iii) change its name from YYPS to JLLP; and

(iv) appoint two directors in JLLP from AHCM and to appoint one director in JLLP from JLLPC

('JLLP's Letter dated 18 February 2014').

In a letter dated 27 March 2014, the Board approved the above application by JLLP and expressly informed JLLP that the Board 'shall withdraw its approval' if JLLP contravenes, among others, any of the provisions of the then applicable VAEA;

(e) JLLP uses JLL brand for its business. In fact, JLL mark is part of JLLP's name. JLL brand is a global brand which is used across 230 offices worldwide in 80 countries (including Malaysia);

(f) JLLP does not use Jones Lang LaSalle name as a brand for marketing purposes. Jones Lang LaSalle name refers to the name of the 'holding company' in USA, namely JLL Inc;

(g) there is no confusion among the public with regard to the identity of SSSB and JLLP. This is evident when SSSB and JLLP have been invited to speak at the same seminars and conferences. On or around April 2016, 'The Edge' newspaper had interviewed both Ms Malathi (from SSSB) and SD4 on the same subject matter without any confusion;

(h) SSSB misrepresents to the public that SSSB is still associated with JLL Group by using the words 'In association with Jones Lang LaSalle' in SSSB's letter dated 10 March 2016 to the Board and a business card of one Ms Serene Chin Shi Ying (from SSSB);

(i) Sovereign Asian Properties Inc ('SAP'), a Mauritius company, has given an interest-free loan of RM1,269,900 to AHCM ('SAP's loan'). During cross-examination of SD4, Dato' Seri Gopal Sri Ram, learned lead counsel for SSSB, applied for a court order under s 165 of the EA ('s 165 application') for JLLP to produce all documents relating to SAP's loan ('AHCM documents'). The s 165 application had been strongly opposed by the defendants (two cases). After hearing submission from learned counsel, I have allowed the s 165 application ('production order') — please see Part G(2) below; and

(j) pursuant to the production order, SD4 produced the following AHCM documents:

(i) a loan agreement dated 9 June 2014 between SAP and AHCM ('SAP loan agreement'). Attached to SAP loan agreement were the following documents, among others:

(1) a PA executed by AHCM in favour of SAP ('AHCM's PA');

(2) a PA executed by SD4 in favour of SAP ('SD4's PA');

(3) a circular resolution of AHCM's directors for the transfer of SD4's shares in AHCM to a transferee ('AHCM's resolution for transfer of shares');

(4) two circular resolutions of AHCM's directors to appoint directors in AHCM ('AHCM's resolutions to appoint directors');

(5) a circular resolution of AHCM's directors to appoint AHCM's corporate representative to attend all general meetings of JLPP's shareholders ('AHCM's resolution to appoint corporate representative');

(6) AHCM's certificate of appointment of AHCM's corporate representative to attend all JLPP's general meetings of shareholders ('AHCM's certificate of appointment of corporate representative');

(7) resignation letter of SD4 as AHCM's director ('SD4's resignation letter');

(8) 'Form 32A', transfer form of shares in JLLP by AHCM ('AHCM's share transfer form'); and

(9) Form 32A regarding transfer of shares in AHCM by SD4 ('SD4's share transfer form'); and

(ii) addendum to SAP loan agreement with an effective date of 30 September 2014 ('Addendum').

F. SSSB'S ALLEGATIONS OF MISCONDUCT

[31] At the outset, I must make clear that I will not decide on SSSB's allegations of misconduct. This is due to the following reasons:

(a) pursuant to O 34 r 2(2)(k) of the RC, in Bundle R, all the parties have agreed to the issues to be tried in the two cases ('agreed issues'). The agreed issues did not concern SSSB's allegations of misconduct. Hence, this court shall only decide on the agreed issues; and

(b) any allegation of misconduct against, among others, a 'registered valuer', 'registered appraiser' and 'registered estate agent' (as defined in s 2 of the then VAEA) should only be investigated into and determined by the Board in accordance with the disciplinary procedure provided by rr 131–138 of the Valuers, Appraisers and Estate Agents Rules 1986 ('the VAEAR') read with s 24 of the present VAEAPM. There is also a right to appeal against any decision of the Board regarding a disciplinary matter to the Appeal Board as provided in ss 27(1)(c) and 29 of the VAEAPM. The statutory duties and functions of the Board and Appeal Board under VAEAPM and VAEAR regarding disciplinary matters, should not be arrogated.

Due to the above reasons, nothing in this judgment should be construed to

support or rebut SSSB's allegations of misconduct.

G. EVIDENCE

G(1). Dual effect of APM's failure to adduce evidence in first suit

[32] Firstly, if there is sworn evidence adduced by one party ('A') in a trial against another party ('B') and there is no evidence from B to rebut A's testimony, the court may presume A's evidence to be true — please see the Federal Court's judgment in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751, at para 4, as follows:

> [4] *In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in Wasakah Singh v Bachan Singh* [1931] 1 MC 125 at p 128:
>
> > *If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because thejudge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.* (Emphasis added.)

[33] The second consequence of B's failure to adduce any evidence to rebut A's evidence is that the court may draw an adverse inference under s 114(g) of the EA against B — please see *Takako Sakao*, at para 5.

[34] In the first suit, no director, employee or agent from APM had been called or subpoenaed to rebut oral evidence from SP1 and SP2 in support of SSSB's claim. As such:

(a) this court presumes the evidence in support of SSSB's claim against APM to be true — please see *Takako Sakao*; and/or

(b) an adverse inference under s 114(g) of the EA is drawn against APM for the following reasons:

(i) SD3 had testified during cross-examination that she had met Mr Tan Loy Fatt, APM's MD ('Mr Tan'), on a couple of occasions. According to SD3, when she last spoke to Mr Tan, Mr Tan 'was able to talk and walk'. Hence, there was no reason why Mr Tan could not have testified for APM in the first suit. In fact, Mr Tan as APM's director owes fiduciary and statutory duties to APM to act in good faith in the best interest of

APM (s 213(1) of the Companies Act 2016 ('the CA')) by defending APM against any baseless suit. If Mr Tan is reluctant to testify in the first suit, APM should have applied to this court for a subpoena to compel Mr Tan to give evidence in the first suit. APM however did not do so;

(ii) even if it is assumed that there is a valid excuse for Mr Tan not to testify in the first suit, no evidence has been adduced by APM on why APM cannot call or subpoena a director other than Mr Tan, any employee or agent from APM to rebut the evidence in support of SSSB's claim against APM;

(iii) APM had actively participated in the first suit as follows:

(1) APM had filed an application together with JLLP to join JLWL as a third defendant in the first suit ('encl 4'). I have dismissed encl 4 with costs ('dismissal of encl 4'). Both APM and JLLP had appealed to the Court of Appeal against the dismissal of encl 4. This appeal was subsequently withdrawn by the defendants ('first suit'); and

(2) jointly with JLLP, APM had filed an application for further and better particulars of SSSB's statement of claim ('encl 7'). Enclosure 7 had been dismissed by me with costs. In view of APM's active involvement in the first suit, the only inference which may be drawn by this court is that any witness who may be called or subpoenaed by APM to testify in the first suit, will only give evidence in favour of SSSB's Claim against APM; and

(3) SSSB had adduced evidence regarding APM's breach of s 23 of the then VAEA (APM's breach) — please see Part J(1) below. APM's refusal to adduce any evidence to rebut SSSB's evidence regarding APM's breach, amounts to a suppression of material evidence regarding APM's Breach and this in turn attracts an adverse inference against APM — please see Mohd Azmi SCJ's judgment in the Supreme Court case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494.

> It is to be noted that in *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33 at pp 34–35, Hashim Yeop Sani CJ (Malaya) in the Supreme Court affirmed the High Court's decision (which drew an adverse inference under s 114(g) of the EA against a defendant).

Premised on the above two reasons, SSSB's claim against APM should be allowed.

G(2). Section 165 application

[35] The s 165 application was made during cross-examination of SD4. Ms Elaine Yap Chin Gaik (learned co-counsel for defendants (two cases)), objected to the s 165 application on the following grounds:

(a) AHCM Documents were not relevant to the two cases. Accordingly, the s 165 application was a fishing expedition to bolster unlawfully SSSB's Claim against JLLP. Ms Elaine Yap further contended that the s 165 application was filed with a collateral purpose and constituted an abuse of court process;

(b) SSSB should have applied for discovery of AHCM documents before the commencement of the trial in the two cases pursuant to O 24 r 3 or 7 of the RC;

(c) SSSB had closed its case and should not be allowed to re-open it; and

(d) AHCM documents are confidential and should not be disclosed to SSSB.

[36] Section 165 of the EA provides as follows:

> 165 *Judge's power to* put questions or *order production*
>
> *The Judge* may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and *may order the production of any document* or thing; and *neither the parties nor their agents shall be entitled to make any objection to any such* question or *order*, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:
>
> *Provided that —*
>
> (i) *the judgment must be based upon facts declared by this Act to be relevant and duly proved;*
>
> (ii) *this section shall not authorize any Judge to compel any witness* to answer any question or *to produce any document which the witness would be entitled to refuse to* answer or *produce under sections 121 to 131 if* the question were asked or *the document were called for by the adverse party*; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; *nor shall he dispense with the primary evidence of any document, except in the cases hereinbefore excepted.* (Emphasis added.)

[37] I am of the following view regarding s 165 of the EA:

(a) s 165 of the EA has two separate limbs ('two limbs') as follows:

(i) the court has a discretion to ask any question from any witness or party 'to discover or to obtain proper proper proof of relevant facts' ('first limb'). Section 3 of the EA provides that a fact is 'relevant' to another when the fact is connected with the other in any of the ways referred to in EA relating to the relevancy of facts; and

(ii) the court has a discretion to order any witness or party to produce any 'document' (defined widely in s 3 of the EA) or 'thing' ('second limb'). The use of a semicolon in s 165 of the EA clearly shows that the two limbs are intended by Parliament to be distinct. A punctuation mark may be relied on by the court in the interpretation of a statutory provision — please see Abdoolcader SCJ's judgment in the majority decision of the Supreme Court in *Dato Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong* [1986] 2 MLJ 112 at p 122;

(b) the application of the two limbs is subject to provisos (i) and (ii) to s 165 of the EA ('two provisos'). In this regard:

(i) based on proviso (i) to s 165 of the EA, the two limbs can only be invoked if:

(1) the question to be asked by the court; and

(2) the evidence to be ordered by the court to be produced is relevant within the meaning of ss 3 and 5 of the EA — please see the Court of Appeal's judgment delivered by Tengku Baharudin Shah JCA in *Paramill Sdn Bhd & Anor v Datuk Joseph Pairin Kitingan* [2007] 7 MLJ 289, at paras 61 and 63; and

(ii) if proviso (ii) to s 165 of the EA does not apply, the fact that a document contains a party's confidential information, does not bar the court's power to order its production pursuant to the second limb. In any event, if a party is concerned about the confidentiality of information contained in any document to be produced in court, the party may apply to court:

(1) to redact the document in respect of the confidential information — please see *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621, at sub-paras 26(1) and (2);

(2) for a protective order to ensure that only the court, the opposing party's lawyers and certain persons from the opposing party can have access to the confidential information — please see Buckley LJ's judgment in the English Court of Appeal case of *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354 at pp 359–360; and/or

(3) for an order that the document can only be produced if the opposing party undertakes to the court that the opposing party shall only use the

document for the purpose of the case;

(c) if the court exercises its discretion to apply the two limbs, the court should ordinarily grant leave for:

(i) further cross-examination by the party who has not called the witness in question (further cross-examination). The further cross-examination is limited to the question asked by the court or the evidence ordered to be produced by the court; and

(ii) further re-examination by the party who has called the witness in question ('further re-examination'). The further re-examination is confined to matters raised in the further cross-examination;

(d) in criminal cases, the court should be circumspect in exercising its discretion under the two limbs — please see Edgar Joseph Jr SCJ's judgment in the Supreme Court case of *Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 553 at pp 561–564, and Andrew Phang JA's decision in the Singapore Court of Appeal case of *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR 1058 at para 175. It is to be noted that our s 165 of the EA is substantially similar to s 167 of Singapore's Evidence Act ('the EA (Singapore)'). Hence, Singapore cases on s 167 EA (Singapore) may be referred to in the interpretation of our s 165 of the EA.

The above view is due to the fact that in criminal cases, the prosecution bears the heavy legal burden to prove the guilt of an accused beyond all reasonable doubt and this legal burden on the prosecution does not shift or be perceived to be alleviated by the court's invocation of the two limbs. If there is any reasonable doubt in the prosecution case, the benefit of such a doubt should be given to an accused — please see the Supreme Court's judgment given by Lee Hun Hoe CJ (Borneo) in *Public Prosecutor v Kau Joo Huat* [1988] 2 MLJ 91 at p 93;

(e) in civil cases, the court may apply the two limbs on its own motion. In *Chiew Lip Seng v Perwira Habib Bank (M) Bhd* [1999] 1 MLJ 310 at pp 314–315, NH Chan JCA (sitting as a the High Court judge) exercised his discretion under the first limb *suo motu* to call a witness for the plaintiff after the plaintiff had closed his case;

(f) s 165 of the EA does not provide any particular time period for the court to apply the two limbs. In fact, it is provided that the first limb may be invoked 'at any time'. Having said that, the court may be reluctant to invoke the two limbs if there is irreparable prejudice to any party due to the advanced state of the trial in question; and

(g) the second limb is not fettered by a party's failure to apply for discovery of documents pursuant to O 24 r 3 or 7 of the RC. This is because firstly, O 24 of the RC concerns discovery and inspection of documents. O 24 of the RC does not provide for questioning of witnesses and admissibility of evidence during trial. Secondly, the two provisos do not refer to O 24 of the RC and as such, the two limbs cannot be subject to O 24 of the RC.

[38] I allow the s 165 Application for the following reasons:

(a) AHCM documents are relevant to the two cases as follows:

(i) SSSB had pleaded in paras 11, 13 and 19D of the re-amended reply to defence and defence to counterclaim that JLLPC is the *alter ego* of the defendants (two cases). As such, AHCM documents are relevant in the two cases on the question of whether the court should exercise its discretion to lift the corporate veil of the defendants (two cases) to reveal that JLLPC is the *alter ego* of the defendants (two cases). AHCM documents are also pertinent for the court to ascertain whether the defendants (two cases), JLLPC and all relevant JLL companies should be treated as a single entity for the purpose of the two cases; and

(ii) Dato' Seri Gopal has alleged that the defendants (first suit) have breached s 23 of the then VAEA ('alleged illegality'). I will elaborate later in this judgment regarding the alleged illegality;

(b) as ACHM documents are relevant to the two cases, the s 165 application is not:

(i) a fishing expedition;

(ii) filed with a collateral purpose; or

(iii) an abuse of court process;

(c) there is no delay on SSSB's part in making the s 165 application. This is because the defendants (two cases) only adduced Bundle T (containing, among others, documents concerning JLLP) on 14 April 2017, after SSSB has closed its case on 8 March 2017. During cross-examination of SD4 on 18 April 2017 based on, among others, Bundle T, SSSB's learned counsel then became aware of the existence of ACHM Documents. Hence, the making of the s 165 application; and

(d) as explained above, the fact that JLLP considered ACHM Documents to be confidential, does not bar the s 165 application. To avoid any prejudice to JLLP:

(i) the court first perused AHCM documents and ascertained that ACHM documents only contained commercial terms between AHCM and JLLP. This was orally confirmed by Ms Chew Kherk Ying, learned co-counsel for the defendants (two cases);

(ii) the court requested SSSB to undertake to court that SSSB would only use AHCM documents solely for the two cases. Such an undertaking was duly given and only then a copy of AHCM documents were given to SSSB; and

(iii) the court granted leave for further cross-examination and further re-examination. It is to be noted that at the time of allowing the s 165 application, the defendants (two cases) had not closed their case. In other words, the defendants (two cases) were not prejudiced by the order of production of AHCM documents because they could call any witness or tender any documentary evidence to explain AHCM documents.

G(3). Admissibility of email dated 14 October 2015

[39] The defendants (two cases) applied to court to expunge 'without prejudice' communications, including the email dated 14 October 2015. Despite the fact that there was no settlement of the dispute in question, Dato' Seri Gopal has contended that the email dated 14 October 2015 is admissible to prove estoppel. Dato' Seri Gopal relies on Robert Walker LJ's (as he then was) judgment in the English Court of Appeal case of *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 783 at p 792, as follows:

> (3) *Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. That was the view of Neuberger J in Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178 *at 191, and his view on that point was not disapproved by this court on appeal ([1998] FSR 530).* (Emphasis added.)

Unilever has been approved by Lord Clarke in the Supreme Court of the United Kingdom *Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others* [2011] 1 AC 662 at paras 21–32. Lord Clarke held in *Oceanbulk* at para 29, as follows:

> [29] *In para [43] [Ofulue & Ors v Bossert* [2009] AC 990*] Lord Rodger recognised the breadth of the without prejudice rule and rejected the proposed exception. So too did Lord Walker. He said at [57] that he would not restrict the without prejudice rule unless justice clearly demands it. This seems to me to be entirely consistent with the approach of Lord Griffiths in Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280*, 1300, where he said that the rule is not absolute and that resort may be had to the without prejudice material for a variety of reasons where the justice of the case requires it. See also per Lord Neuberger at [89], endorsing the passage from the judgment of Robert Walker LJ in the Unilever case [2001] 1 WLR 2436, 2448–2449 (referred to above).* (Emphasis added.)

[40] Section 23 of the EA reads as follows:

23 Admissions in civil cases when relevant

In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given. (Emphasis added.)

[41] Section 23 of the EA bars the admissibility of an 'admission'. According to s 17(1) of the EA an 'admission' is:

(1) 'a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact'; *and*

(2) the statement is made by any of the persons and under the circumstances mentioned in ss 18(1), (3)(a), (3)(b), 19 and 20 of the EA — please see *Evidence — Practice and Procedure* Augustine Paul (3rd Ed, 2003) at p 162.

[42] The email dated 14 October 2015 stated as follows:

Dear [SP1],

Thank you for your email of the 29th September.

We have looked at your key terms and find a number of them unacceptable. As the gaps are big and it is unlikely that we will come to an understanding that works for both parties, I think it is best that we withdraw from our discussion to acquire your business in Malaysia. It is an unfortunate decision but the right one in the circumstances.

On behalf of JLL I would like to thank you for the time you have put into these negotiations and we wish you all the best for the future.

...

[Mr Fossick]. (Emphasis added.)

[43] I am of the view that the contents of the email dated 14 October 2015 concerned negotiations by JLLPC to acquire SSSB's business. The email dated 14 October 2015 does not amount to an 'admission' within the meaning of s 17(1) of the EA because:

(a) the contents of the email dated 14 October 2015 did not suggest any inference as to any 'fact in issue' (defined in s 3 of the EA) or 'relevant fact' in the two cases; *and*

(b) the email dated 14 October 2015 was not made by any of the persons and under the circumstances mentioned in ss 18(1), (3)(a), (3)(b), 19 and 20 of the EA.

Based on the above two reasons, I have no hesitation to admit the email dated 14 October 2015 as evidence in the two cases.

[44] All the cases cited on behalf of the defendants (two cases) may be distinguished on one or both of the two reasons stated in the above para 43.

[45] The defendants (two cases) have contended that Mr Fossick has affirmed an affidavit on 3 March 2017 (encl 75) ('Mr Fossick's affidavit') to oppose SSSB's application to re-amend its Amended reply to defence and defence to counterclaim ('SSSB's amendment application'). Paragraph 4 of Mr Fossick's affidavit has alleged that 'without prejudice' negotiations were carried out to acquire SSSB as a 'business solution' and as a means to resolve the two cases. I am not able to accept Mr Fossick's affidavit as evidence in the two cases because Mr Fossick has not been called by any party to give evidence in the two cases. As such, the truth of the contents of Mr Fossick's affidavit cannot be tested by way of cross-examination. It is unjust for any party to rely on an affidavit filed in respect of interlocutory proceedings when the party did not call the deponent of the affidavit to testify in the trial.

[46] With respect, I am not able to accept *Oceanbulk* and *Unilever* because:

(a) our EA, despite its name, is a code of law which is intended to be comprehensive — please see the Privy Council's opinion delivered by Lord Diplock on an appeal from Malaysia, *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 at p 90. UK has no statutory provision which is identical or similar to s 23 of the EA. Accordingly, s 23 of the EA should be given its literal effect without being affected by cases from jurisdictions which have no equivalent to our s 23 of the EA; and

(b) in the Federal Court case of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 at para 29, Zainun Ali FCJ did not follow *Oceanbulk* and held as follows:

> [29] *While evidence of previous negotiations of the parties and their declarations of subjective intent have been excluded from the admissible background in the third/CS principle (see above), there is reason to believe that this rule has been somewhat diluted as a matter of English law in the case of Oceanbulk* [2011] 1 AC 662 *where the Supreme Court accepted as admissible 'without prejudice' negotiations prior to a settlement agreement to demonstrate the 'relevant background' and aid in the interpretation of the settlement agreement. While the intentions of the Supreme Court were noble, it is the view of this court that the approach taken in Oceanbulk is too permissive to be applied to the Malaysian context.* (Emphasis added.)

G(4). Credibility of witnesses

[47] I find as a fact that SP1 is a credible witness because:

(a) for reasons explained in paras 76–79 below, SSSB is the lawful proprietor of goodwill attached to its real estate business regarding JLW Marks in Malaysia (not in other countries). Furthermore, SSSB has actually used JLW Marks in its business in this country;

(b) SSSB has a proprietary interest in Jones Lang Wootton name and JLW mark — please see para 95 below; and

(c) as elaborated in sub-para 96(2) below, among others, the covenant (1982) has been superceded by the sublicence (1993). Accordingly, the defendants (two cases) cannot complain that the following acts have breached cl 1(a) and (b) of covenant (1982):

(i) the filing of SSSB's trademark application and the subsequent registration of Jones Lang Wootton registered trademark; and

(ii) the incorporation of JLWSB and the appointment of SP1 as its director.

[48] I have not overlooked Ms Chee's SD. Firstly, SP1 can only be cross-examined as to his previous statements (oral or written) and not in respect of Ms Chee's SD — please see s 145(1) and (2) of the EA. Furthermore, SP1's credit may only be impeached based on, among others, his own former statements — please see s 155(c) of the EA. In other words, the contents of Ms Chee's SD cannot prove that SP1 is not a reliable witness.

[49] SP2 and SD1 gave evidence based on documents. There is no documentary evidence to prove that SP2 and SD1 are not witnesses of truth.

[50] I doubt SD2's credibility because:

(a) during cross-examination, SD2 testified that 'Intel' company terminated its contracts with SSSB because Intel was dissatisfied with SSSB's services. However, Intel's letter dated 25 March 2011 to SSSB stated, among others, that Intel terminated its contracts with SSSB at the 'request of Jones Lang LaSalle' ('Intel's letter dated 25 March 2011'). The contents of Intel's letter dated 25 March 2011 clearly undermined SD2's credibility. When there is a conflict between contemporaneous documentary evidence and self-serving oral testimony, I will readily accept the former — please see Siti Norma Yaakob JCA's (as she then was) judgment in the Court of Appeal case of *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433 at p 439; [2000] 4 CLJ 324 at p 330; and

(b) SD2's first witness statement categorically alleged that JLL Group's corporate clients were unhappy with SSSB's services. During cross-examination, SD2 testified that he has documents, letters and emails from JLL Group's corporate clients which expressed their discontent with SSSB's services. SD2 however admitted that such documents, letters and emails had not been adduced as evidence in the two cases. It is difficult to believe a witness who makes a serious allegation against an adverse party and claims to have documentary evidence to support that allegation but does not however tender such evidence in court.

[51] I do not find SD3 to be a reliable witness. This is because SD3's second witness statement stated that Intel was 'very unhappy' with SSSB's services and this was the reason for Intel's decision to terminate its agreement with SSSB. SD3 had seen Intel's letter dated 25 March 2011 and she claimed that she had taken up its contents with Intel because those contents were inaccurate.

During cross-examination, SD3 admitted that she did not inform SSSB that the contents of Intel's letter dated 25 March 2011 were inaccurate. SD3 further admitted that her allegation (the contents of Intel's letter dated 25 March 2011 were inaccurate) was only raised for the very first time in the two cases. I do not accept SD3's evidence that the contents of Intel's letter dated 25 March 2011 were inaccurate. This is because Intel's letter dated 25 March 2011 had been copied to SD3. SD3 is a lawyer by training and as Regional General Counsel for JLL Group for Asia Pacific at the material time, she had the responsibility to protect the interest of JLLPC. If the contents of Intel's letter dated 25 March 2011 were indeed inaccurate, in the discharge of SD3's duties owed to JLLPC, she should have written to both Intel and SSSB to state as such.

[52] It is this court's finding of fact that SD4 lacks credibility. This decision is premised on the following evidence and reasons:

(a) SD4 is not a simpleton. SD4 has an accounting background and is a member of Malaysian Institute of Accountants. SD4 is the MD for JLLP and AHCM. SD4 was one of the two signatories of the relevant financial statements of JLLP and AHCM. Pursuant to the then s 169(16) of the Companies Act 1965, SD4 affirmed a SD regarding AHCM's financial statements as the 'director primarily responsible for the financial management' of AHCM. SD4 has also more than 25 years of experience in real estate business.

Despite SD4's accounting background and vast work experience in the field of real estate, she gave the following evidence:

(i) during further cross-examination, SD4 disagreed with Dato' Seri Gopal that AHCM's directors' resolution dated 9 June 2014 ('AHCM's resolution dated 9 June 2014') did not authorise:

(1) AHCM to purchase SD4's shares in JLLP; and

(2) part of SAP's Loan to be credited directly into SD4's personal bank account in Singapore.

A perusal of AHCM's resolution dated 9 June 2014 clearly showed that SD4's above testimony could not be true. Furthermore, AHCM's resolution dated 9 June 2014 had been co-signed by SD4 as a director of AHCM and she admitted during further cross-examination that she understood the contents of AHCM's resolution dated 9 June 2014;

(ii) initially, SD4 denied being 'in charge' of JLLP's financial matters. SD4 even claimed that one Ms Wong Jien Yee ('Ms Wong'), JLLP's finance manager, was in charge of JLLP's accounts. Subsequently, when SD4 was confronted with her own signature (as JLLP's director) on the relevant JLLP's financial statement, she did a *volte-face* and admitted that she was responsible for JLLP's financial matters. During re-examination, SD4 stated that Ms Wong was 'in charge' of JLLP's accounts because Ms Wong prepared JLLP's accounts! A person who is not a director of a company and who merely prepares the company's accounts, cannot be described, by any stretch of imagination, to be 'in charge' of the company's accounts;

(iii) when asked whether SD4 knew the source of SAP's Loan, she gave conflicting answers. Firstly, she stated that she did not know the source of SAP's Loan. She then testified that she could not remember the source of SAP's Loan. There is a difference between a person who has no knowledge of a matter and a person who knows about that matter but has forgotten about it; and

(iv) when SD4 was asked whether she would agree that if a person subscribes shares in a company, the payment for the subscription should have been paid to the company, she incredulously answered 'I think so'. Such an answer is less than honest;

(b) in view of SD4's prevarication during cross-examination, the court had to remind her that she had taken an oath to tell the truth. Despite such a reminder, SD4 continued to be evasive throughout her cross-examination. When asked whether AHCM is a subsidiary of JLL Inc, SD4 initially answered that she did not know the answer. Shortly thereafter, SD4 testified that AHCM is not a subsidiary of JLL Inc. In view of such a material contradiction in SD4's own evidence, in the interest of justice, the court read and explained s 132 of

the EA to SD4. The relevant part of s 132 of the EA reads as follows:

> 132 Witness not excused from answering on ground that answer will criminate
>
> (1) *A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil* or criminal *proceeding, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind*, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.
>
> (2) *No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.*
>
> (3) *Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate him the court shall explain to the witness the purport of subsection (2).* (Emphasis added.)

(c) SD4 had a motive within the meaning of s 8(1) of the EA to conceal JLPP's breach of s 23 of the VAEA from this court ('JLLP's breach'). This is because if JLLP's breach is revealed in the two cases, the Board may subsequently exercise its discretion to, among others, cancel JLLP's registration with the Board. Hence, SD4 gave untrue and self-serving evidence in the two cases so as to conceal JLLP's breach; and

(d) when SD4 was cross-examined, she was hesitant, uncertain, slow and even evasive. During re-examination, SD4 was a changed person — she answered questions confidently, clearly and timeously.

G(5). Have AHCM documents been executed?

[53] SD4 initially answered during cross-examination that she was not sure whether she had signed SD4's PA and AHCM's PA (as AHCM's director). Subsequently, SD4 testified that she could not remember whether she had signed SD4's PA and AHCM's PA (as AHCM's director). SD4 further testified that except for SAP loan agreement, she was unsure whether she had signed the other AHCM's documents.

I am not able to accept the above evidence from SD4 because SD4 is not a witness of truth (please see the above para 52). I find as a fact that the following AHCM Documents have been executed by AHCM and/or SD4:

(a) AHCM's PA;

(b) SD4's PA;

(c) AHCM's resolution for transfer of shares;

(d) AHCM's resolutions to appoint directors;

(e) AHCM's resolution to appoint corporate representative;

(f) AHCM's certificate of appointment of corporate representative;

(g) SD4's resignation letter;

(h) AHCM's share transfer form; and

(i) SD4's share transfer form.

The above finding is based on the following evidence and reasons:

(i) the definition of 'Security Documents' in cl 1.1 of SAP loan agreement included AHCM's PA and SD4's PA. Clause 3.1(c) of SAP loan agreement has expressly provided as one of the conditions precedent that SAP 'shall not be obliged to make available' SAP's loan unless AHCM delivers the 'duly executed Security Documents';

(ii) certain AHCM documents have been expressly referred to in the definitions of 'Power of Attorney', 'Resignation', and 'Resolutions' in cl 1.1 SAP loan agreement. In fact, the form of certain AHCM documents has been set out in Appendices 2A, 28, 4 and 5 to SAP loan agreement;

(iii) the addendum amended SAP loan agreement only in respect of the amount of SAP loan. Clause 2 of the addendum stated that except as amended by the addendum, 'all other terms and provisions' of SAP loan agreement 'shall remain in full force and effect'. The addendum did not vary SAP loan agreement by releasing AHCM's obligation to execute and deliver AHCM documents to SAP; and

(iv) it is inconceivable for SAP to have disbursed the entire interest-free loan sum of RM1,269,900 if the AHCM documents had not been executed and delivered by AHCM to SAP.

H. WHETHER THE COURT SHOULD LIFT CORPORATE VEIL

[54] Section 20 of the CA provides that a company is a body corporate with a legal personality ('general rule'). The effect of the general rule is that a company is a legal entity which is distinct from all other companies, including its:

(1) 'holding company' (explained in s 4(4) of the CA);

(2) 'subsidiary' (please see s 4(1), (2) and (3) of the CA);

(3) 'wholly-owned subsidiary' (explained in s 6(a) and (b) of the CA); and

(4) 'related company' (as defined in s 7(a), (b) or (c) of the CA).

[55] In the following cases, the court has pierced or lifted the corporate veil

of a group of companies to reveal a single entity controlling all the relevant companies ('piercing/lifting corporate veil (group of companies)'):

(a) in the Federal Court case of *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 at p 112, Salleh Abas FJ (as he then was) lifted the corporate veil of the holding company (hotel) and its wholly-owned subsidiary (Chinese restaurant in the hotel) to reveal the hotel as the employer of the workers in the Chinese restaurant. According to *Hotel Jaya Puri*, the court would lift the corporate veil of companies 'when the justice of the case so demands'; and

(b) Edgar Joseph Jr J (as he then was) in the High Court case of *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487 at p 502, pierced the corporate veil of the companies in question 'whenever it is just and equitable to do so'.

[56] In *Chanel v Melwani2 International Sdn Bhd & Ors and other suits* [2017] 10 MLJ 592 at para 16, I have followed a trilogy of Federal Court cases in *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785 at p 803; [2014] 3 CLJ 73 at p 92, *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773 at paras 96–99 and *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449; [2015] 9 CLJ 537, at paras 39 and 44–45 ('three Federal Court cases'). The three Federal Court cases have laid down the following two conditions to be fulfilled cumulatively ('two conditions') for the court to pierce or lift a corporate veil to reveal an individual as the *alter ego*, controller or 'directing mind and wilt' of the company ('piercing/lifting corporate veil (company vis a vis individual)'):

(a) there exists special circumstances to pierce or lift the corporate veil ('first condition'), such as:

(i) there has been commission of actual fraud or common law fraud;

(ii) equitable fraud or constructive fraud has been committed;

(iii) to prevent an evasion of liability; or

(iv) to prevent an abuse of corporate personality; *and*

(b) the piercing or lifting of a corporate veil is in the interest of justice ('second condition').

[57] Regarding the court's discretionary power in respect of piercing/lifting corporate veil (group of companies), I am of the following view:

(a) the exercise of the court's power regarding piercing/lifting corporate veil (group of companies) should be the same as that for piercing/lifting corporate veil (company vis a vis individual). This is because both piercing/lifting corporate veil (group of companies) and piercing/lifting corporate veil (company vis a vis individual) constitute exceptions to the general rule. Furthermore, there is nothing in principle or policy to distinguish the exercise of the court's discretion with respect to piercing/lifting corporate veil (companies) and piercing/lifting corporate veil (company vis a vis individual); and

(b) as the court's power regarding piercing/lifting corporate veil (group of companies) is an exception to the general rule, I am not able to apply the wide and less stringent test (merely in the interest of justice or equity) as laid down in *Hotel Jaya Puri* and *Tan Guan Eng*. This is because an application of a less exacting test will undermine the general rule. Accordingly, I am in favour of the more stringent test requiring the fulfillment of the two conditions as laid down by the three Federal Court cases for piercing/lifting corporate veil (company vis a vis individual).

[58] In the two cases, SSSB applied to lift and not to pierce the corporate veil of the defendants (two cases). This is because SSSB's claim does not seek to impose liability on JLLPC or any company other than the defendants (first suit) — please see Staughton LJ's judgment in the English Court of Appeal case of *Atlas Maritime Co SA v Avalon Maritime Ltd; The Coral Rose (No 1)* [1991] 4 All ER 769 at p 779.

[59] I am of the view that the two conditions have been fulfilled for the court to lift the corporate veil of the defendants (two cases) to show that their alter ego is JLLPC. This decision is based on the following evidence and reasons:

(1) the first condition has been satisfied as the following special circumstances exist in the two cases:

(a) cl 6 sublicence (1993) should not be unlawfully circumvented by the reliance on separate legal personalities of the defendants (two cases);

(b) the corporate veil of the defendants (first suit) is lifted to prevent the defendants (first suit) from evading their liability for the tort of passing off to SSSB in the first suit;

(c) to ascertain whether the defendants (first suit) have abused their corporate personality by committing the alleged illegality or by unlawfully circumventing s 23 of the then VAEA; *and/or*

(d) to decide whether JLWL has abused its corporate personality by filing the second suit when JLWL is prohibited from carrying on real estate

A business in Malaysia with the use of Jones Lang Wootton composite mark by s 23 of the then VAEA; and

(2) the second condition is met because the following evidence and reasons show that it is in the interest of justice to lift the corporate veil of the defendants (two cases) to reveal that JLLPC is their alter ego:

B

(a) Mr Fossick is employed by JLLPC as the MD for the business of JLL Group for Singapore and South East Asia. Mr Fossick's email dated 14 October 2015 clearly showed that JLLPC controls the defendants (two cases) because:

C

(i) JLLP negotiated with SSSB to settle the two cases on behalf of the defendants (two cases); and

(ii) if JLLPC is not the alter ego of the defendants (two cases), the latter would not have objected to the admissibility of Mr Fossick's email dated 14 October 2015 as evidence in the two cases;

D

(b) Mr Fossick's affidavit had been affirmed on behalf of the defendants (two cases) to oppose SSSB's amendment application;

E

(c) SD2 and SD3 are part of JLLPC's senior management. SD2 and SD3 are not directors, employees or agents of the defendants (two cases) and yet, they gave evidence in the two cases on behalf of the defendants (two cases);

F

(d) SD4 admitted during cross-examination that JLLPC introduced SAP to SD4. If JLLPC did not control JLLP, JLLPC would not have arranged for an interest-free SAP Loan of RM1,269,900 to AHCM. Furthermore, no part of SAP Loan has been repaid by AHCM;

G

(e) JLLP owns 49% of the total shareholding of JLLP while Mr Fossick is a director of JLLP. SD4 testified that every month, she would have a 'call' with Mr Fossick and JLLP's finance department to give Mr Fossick a 'general overview'. If JLLPC is not the alter ego of JLLP, JLLP would not have a monthly discussion with Mr Fossick (who represents JLLPC); and

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(f) Ms Marina Krishnan ('Ms Marina') is a director of APM. SD3 admitted during cross-examination that Ms Marina is employed by JLLPC or a company in the JLL Group.

I

[60] It is also the decision of this court that the two conditions have been satisfied for the court to lift the corporate veil of the defendants (two cases), JLLPC, JLL Inc, JLL IP Inc, JLWP and all other relevant JLL companies to reveal that these companies have acted as a single entity (as JLL Group) in the two cases. This decision is supported by the following evidence and reasons:

(a) the first condition is met as explained in any one or more the above sub-paras 59(1)(a)–(d); and

(b) the second condition is fulfilled by the following evidence and reasons:

(i) according to SD3, JLL IP Inc considered opposing SSSB's trademark application. However, JLL IP Inc did not do so as a business decision because SSSB was then servicing all the clients of JLL Group in Malaysia. In this sense, all relevant JLL companies acted as a single entity;

(ii) JLL Group rebranded itself in 2014 and only uses JLL name, JLL composite mark and JLL registered trademarks in the business of all the companies in JLL Group. JLL Group has also stopped using Jones Lang LaSalle name for its business. Hence, Jones Lang Wootton registered trademarks (other countries) have expired or have been cancelled. In this regard, JLL Group has acted as a single entity; and

(iii) SD1 is employed by JLL (NSW). SD1 is not a director, employee or agent of the defendants (two cases). JLL (NSW) has no interest in the two cases and yet, SD1 testified in the two cases. Clearly, all relevant JLL companies acted as one entity to oppose SSSB in the two cases.

I. EFFECT OF S 23 OF THE VAA AND ITS SUBSEQUENT AMENDMENTS

I(1). VAA

[61] The title to VAA states that VAA is to, among others, provide for the registration of valuers and appraisers. The Board has, among others, the function under s 10(b) of the VAA to approve or reject applications to register valuers and appraisers. Section 19 of the VAA provides that only 'registered valuers' and 'registered appraisers' (defined in s 2 of the VAA) who have been issued with 'authority to practise' (under s 16 of the VAA) by the Board, are 'entitled to practise' their profession.

[62] Section 23 of the VAA initially provided as follows:

> 23 Practice of partnership or body corporate
>
> *The Board may approve, subject to such conditions or restrictions as it may deem fit to impose, a partnership or body corporate to practise valuation with the right to charge and be charged and to recover in any court any fee, charge or remuneration for any professional advice or services rendered by it pursuant to its practice provided that —*
>
> (a) *the partners or Board of Directors, as the case may be, of the partnership or body corporate consists entirely of registered valuers or registered appraisers;*

A (b) *the shares in the partnership or body corporate are held entirely by registered valuers or registered appraisers; and*

(c) *the partnership or body corporate accepts the obligation to furnish to the Board a true written report of any change in the composition of its organisation or in shareholding thereof within two weeks of the occurrence of such change, but not otherwise.* (Emphasis added.)

B

It is clear that under s 23 of the VAA:

(a) for partnerships providing services as valuers and appraisers:

C

(i) all the partners must be registered with the Board as registered valuers/appraisers; and

(ii) all the shares in the partnerships must be owned by registered valuers/appraisers;

D

(b) for companies providing services as valuers and appraisers:

(i) all the directors must be registered with the Board as registered valuers/appraisers; and

E (ii) all the shares in the companies must be owned by registered valuers/appraisers.

[63] With the introduction of VAA on 6 February 1981, by reason of s 23 of the VAA, the Malaysian firm could not offer services as valuers and appraisers. This is because firstly, not all the partners of the Malaysian firm could be registered with the Board as registered valuers/appraisers. Secondly, all the shares in the Malaysian firm were not owned by registered valuers/appraisers.

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I(2). Act A980

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[64] A new s 23 of the VAEA is substituted by Act A980.

I(3). Act A1404

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[65] Act A1404 has amended, among others, s 23 of the VAEA. I reproduce below the relevant part of the present s 23 of the VAEA:

23(1) *No registered valuer, appraiser or estate agent shall practice valuation, appraisal or estate agency or have the right to recover in any court any fee, commission, charge or remuneration for any professional advice or services rendered by him pursuant to his practice unless he practises as a sole proprietor of a sole proprietorship, a partner of a partnership, a shareholder or director of a body corporate registered with the Board, or as an employee of such sole proprietorship, partnership or body corporate.*

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(2) *A* partnership or *body corporate practising valuation, appraisal or estate agency, as*

the case may be, shall not be registered by the Board unless —

...

(a) all partners of the partnership or *all directors and shareholders of the body corporate are —*

(i) *in the case of a valuation practice —*

(A) solely registered valuers;

(B) a combination of registered valuers, registered appraisals and registered estate agents; or

(C) *a combination of registered valuers and any other persons or bodies corporate;*

(ii) *in the case of an appraisal practice —*

(A) solely registered appraisers;

(B) a combination of registered appraisals, registered valuers and registered estate agents; or

(C) *a combination of registered appraisers and any other persons or bodies corporate;* and

(iii) *in the case of an estate agency practice —*

(A) solely registered agents;

(B) a combination of registered estate agents, registered valuers and registered appraisals; or

(C) *a combination of registered estate agents and any other persons or bodies corporate; and*

(b) *the shares in* the partnership or *body corporate are held —*

(i) in the case of a valuation practice, solely by registered valuers;

(ii) in the case of an appraisal practice, solely by registered appraisers;

(iii) in the case of an estate agency practice, solely by registered estate agents; and

(iv) *in the case of a* partnership or *body corporate where* all partners of the partnership or *all directors and shareholders of the body corporate are* a combination of registered valuers, registered appraisers and registered estate agents and any other persons or bodies corporate —

(A) *in the case of a valuation practice, by a majority of valuers who hold the majority interest and the voting rights;*

(B) *in the case of an appraisal practice, by a majority of appraisers who hold the majority interest and the voting rights; and*

(C) *in the case of an estate agency practice, by a majority of estate agents who hold the majority interest and voting rights;* and

(4A) *Notwithstanding subsection (2) or (4), the Board shall cancel the registration of* a firm if the Board finds that —

(a) the composition of the partners of the partnership or *the directors of the body corporate practising valuation, appraisal or estate agency does not comply with the requirement in subsection (2);*

(b) *the shareholding of the* partnership or *body corporate practising valuation, appraisal or estate agency does not comply with the requirement in subsection (2);*

(c) *any* partner of a partnership or *director of a body corporate practising valuation, appraisal or estate agency, whether such* a partner or a *director is a registered valuer, appraiser or estate agent or otherwise, commits, or contributes to, any of the acts specified in paragraphs* (a), *(b) or (c)*; and ... (Emphasis added.)

[66] Regarding a firm or a company ('X') which offers services of a valuer, appraiser and estate agent, I am of the following view:

(a) X has to apply to be registered with the Board — please see s 23(1) of the VAEA;

(b) the Board may register X which has partners (if X is a firm) or directors and shareholders (if X is a company) who are:

(i) registered valuers, registered appraisers and registered estate agents ('registered persons'); *and*

(ii) *not* registered valuers, registered appraisers and registered estate agents ('non-registered persons')

provided that the registered persons shall:

(1) hold a majority of the shares in X and control the voting rights in X; *and*

(2) have control of X's management and operation.

The above interpretation is supported by the following reasons:

(2A) s 23(2)(b)(iv)(A), (B) and (C) of the VAEA expressly require the registered persons to 'hold the majority interest and voting rights' of X. Hence, the above view is supported by a literal construction of s 23(2)(b)(iv)(A), (B) and (C) of the VAEA; and

(2B) Part 1 of the Interpretation Acts 1948 and 1967 ('the IA') applies to VAEA by virtue of s 2(1)(a) of the IA (VAEA is enacted after 18 May 1967). According to s 17A of the IA (in Part 1 of the IA), an Act of Parliament should be construed in a manner which would promote the purpose or object of the Act — please see the Federal

Court's judgment in *Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265.

> The purpose of s 23 of the VAEA is to ensure that firms/companies offering services by registered persons, are controlled solely by registered persons in terms of the shareholding and operation of the firms/companies. The control of X's shareholding and operation by registered persons cannot be delegated to or replaced by any non-registered person;

(c) pursuant to the above interpretation of s 23 of the VAEA, registered persons may incorporate a company ('X's holding company') to control X's shareholding and operation subject to the fulfillment of all the following three conditions ('three conditions'):

(i) all the shares and voting rights in X's holding company are owned by registered persons only;

(ii) all the directors of X's holding company are registered persons; *and*

(iii) registered persons have control of the management and operation of X's holding company.

If all the three conditions are not met, this will allow an unlawful circumvention of s 23 of the VAEA in this manner — a non-registered person has control of X's holding company and consequently, the non-registered person has control of X's shareholding and operation;

(d) the above construction of s 23 of the VAEA is in consonance with a notification dated 28 December 2011 issued by the Board regarding the criteria to be adopted by the Board in registering companies under s 23 of the VAEA ('Board's notification (28 December 2011)'). The Board's notification (28 December 2011) is issued pursuant to the Board's function under s 10(i) of the then VAEA (*generally, to do all such acts, matters and things as are necessary to carry out* ... (Part 6 of the VAEA *which contains s 23*)). According to the Board's notification (28 December 2011), among others:

SECTION 23 — LIBERALISATION

... the Board shall adopt the following criteria when registering companies with local or foreign equity:

A. Equity Shareholding Structure for a Body Corporate

(i) *A Company shall comprise both registered persons and/or non-registered persons as shareholders SUBJECT ALWAYS TO the registered persons collectively holding (whether directly or indirectly) not less than 51% of the equity interest or ordinary shareholding in the company.*

A (ii) *A group of Registered Persons shall incorporate a company as an investment holding company to hold the majority equity interest in a Registered Company SUBJECT ALWAYS TO approval being granted by the Board.*

Such a company shall be recognised as an 'Approved Holding Company'. An B *Approved Holding Company must have all its directors being Registered Persons and its entire equity interest being held directly in the name of the Registered Persons only.*

(iii) *A Registered Company shall ensure that at all times not less than 51% of its effective equity interest shall be held by Registered Persons via* C *Approved Holding Company. ...*

B. Board of Directors and Management

(i) *The board of directors of a Registered Company must have at least 2 directors who are Registered Persons.*

D (ii) *The board of directors of a Registered Company must have a majority of directors who are Registered Persons SUBJECT ALWAYS TO the composition of the board of directors to reflect the proportion of equity interest between the Registered Persons and non-Registered Persons with the number of directors appointed by non-Registered Persons not exceeding the proportion of the equity* E *interest held by non-Registered Persons.*

(iii) *The Chair person of the board of directors of a Registered Company or Registered Subsidiary shall be nominated by the Approved Holding Company.*

(iv) *The Senior Management of a Company shall be vested in the hands of* F *Registered Person(s) only.*

D. Management of a Company

(i) *The management of a Registered Company, Registered Approved Holding Company and Registered Subsidiary shall be vested in the hands of Registered* G *Persons only.*

Glossary of Terms

'Effective Equity Interest'	means determination of the shareholding in a Company as held by its ultimate shareholders, who must be Registered Persons.
H 'Senior Management'	means the (MD), executive director or chief executive officer or such other like positions carrying on the day-to-day management of a Company or functions of similar nature notwithstanding how such positions are styled, named or titled. (Emphasis added.)

I

(e) the above construction of s 23 of the VAEA does not prohibit X from entering into a strategic alliance, affiliation, association, arrangement or co-operation with any non-registered person so long as:

(i) registered persons own a majority of the shares in X, control the voting rights and operation of X; or

(ii) all the three conditions are satisfied with regard to X's holding company; and

(f) if X is initially controlled by registered persons (either directly or through X's holding company) and is then registered by the Board, the Board has a discretion to cancel X's registration if:

(i) X is subsequently not controlled by registered persons — please see s 23(4A)(b) or (c) of the VAEA;

(ii) any one of the three conditions regarding X's holding company is not fulfilled; or

(iii) any partner or director of X, whether such a partner or director is a registered person or not, 'commits or contributes to' any act which may cause:

(A) the registered persons to lose control of X — please see s 23(4A)(d) of the VAEA; or

(B) the non-fulfilment of any one of the three conditions regarding X's holding company.

Despite the use of the word 'shall' in s 23(4A) of the VAEA, I am of the opinion that the Board has a discretion to cancel the registration of any firm or company if the Board finds the existence of any of the circumstances stipulated in s 23(4A)(a)–(e) of the VAEA. This is because if there is a complaint that X has breached s 23(2)(b)(iv)(A), (B) or (C) of the VAEA, this may constitute a disciplinary matter under s 24(1)(d) for which the Board has wide discretionary powers of sanction under s 24(1)(i)–(vi) and (1A) of the VAEA.

I(4). Valuers, Appraisers and Estate Agents (Amendment) Act 2017 (Act A1550)

[67] In the course of preparing this judgment, Parliament has passed Act A1550. Act A1550 comes into force on 2 January 2018 and has, among others:

(a) renamed VAEA as VAEAPM;

(b) renamed the Board as the Board of Valuers, Appraisers, Estate Agents and Property Managers;

(c) required the registration of property managers by the Board; and

(d) extended the application of s 23 of the VAEAPM to the practice of 'property management' by 'registered property managers'. The above

A interpretation s 23 of the VAEAPM is now applicable to registered property managers.

J(1). Has APM breached or unlawfully evaded s 23 of the VAEA?

B **[68]** According to APM's records with Suruhanjaya Syarikat Malaysia, all the shares in APM are held by two individuals, Mr Tan and Mr Jamie Tan Mun Onn (who are presumably registered persons). Despite such evidence, based on the interpretation of the then s 23 of the VAEA in the above Part I(3), I am of the view that APM has breached or has unlawfully circumvented s 23 of the C VAEA in the following manner:

(a) JLL Inc's documents filed with SEC in 2014–2016 (JLL Inc's Filing with SEC) stated that APM was a subsidiary of JLL Inc. Accordingly, JLL Inc D (non-registered person) holds a majority of the shares in APM and controls the voting rights of APM's shares;

(b) registered persons do not have control of the management and operation of APM. This is clear from APM's own documentary evidence as follows:

E (i) APM's profile stated, among others, as follows:

> *[APM] was incorporated in 2010 principally to support [JLLPC] of Singapore to carry out Integrated Facilities Management for commercial, Institutional and Industrial buildings in Malaysia.*
>
> F ...
>
> *[APM] follows the Jones Lang LaSalle's operating and management procedures including industry's best practices in carrying out its Integrated Facilities Management in Malaysia. The following page shows that APM is an integral part* G *of the Jones Lang LaSalle's Asia Pacific operations.* (Emphasis added.)

(ii) APM's six advertisements of job vacancies in 'JobStreet.com' in 2014 and 2015 stated that JLL Inc 'operates in Malaysia' through APM; and

(iii) APM's profile stated that the following persons hold positions in APM;

H (1) Mr Jordi Martin is the MD for Integrated Facilities Management;

(2) Mr Peter Hilderson is in 'Energy, Engineering Operation';

(3) Mr Cameron Scott is the Chief Operating Officer;

I (4) Mr Chris Hunt is 'Australasia Hub Lead';

(5) Mr Yash Kapila is 'West Asia Hub Lead';

(6) Mr Ian Bottrell is 'North Asia Hub Lead';

(7) Ms Marina is 'South Asia Hub Lead and Head of Regional Accounts'; and

(8) Mr Susheel Koul is 'Asia Pacific Solutions Development Lead'.

SD3 confirmed during cross-examination that all the above persons were employed by JLLPC or a company in the JLL Group at the material time; and

(c) APM did not correct or retract the above publications. Nor did APM's MD, director, employee or agent give any evidence to rebut or explain the above publications by APM.

I have not overlooked the oral evidence of SD2 and SD3 who disagreed with the contents of APM's profile. As explained in *Guan Teik Sdn Bhd*, I prefer contemporaneous documentary evidence over self-serving oral testimony.

J(2). Whether JLLP has breached or unlawfully circumvented s 23 of the VAEA

[69] JLLP has been registered with the Board regarding the provision of estate agency services while AHCM has been approved by the Board as JLLP's approved holding company.

[70] I find as a fact that JLLP's Breach has been proven as follows:

(a) JLL Inc's Filing with SEC stated that JLLP was a subsidiary of JLL Inc. Accordingly, JLL Inc (non-registered person) holds a majority of the shares in JLLP and controls the voting rights of JLLP's shares; and

(b) one of the three conditions regarding AHCM is not fulfilled — the management and operation of AHCM is controlled by SAP (non-registered person) and not by registered persons. This is clear from the following evidence and reasons:

(i) according to the SAP loan agreement, AHCM 'undertakes and agrees' with SAP that unless SAP otherwise agrees, AHCM 'shall not':

(1) 'appoint, replace or remove any member of the board of directors, auditors, company secretary, or senior management' of AHCM and JLLP — cl 12.2.(a);

(2) 'approve the key corporate policy, management rules ... and incentive plan' of AHCM and JLLP — cl 12.2.(b);

(3) 'change the shareholdings in or ownership or control (direct or indirect)' of AHCM and JLLP — cl 12.2.(e);

(4) 'approve or adopt the business plan, annual budgets' of AHCM and JLLP — cl 12.2.(f);

(5) 'approve or enter into any contracts or agreements to be entered into' by AHCM and JLLP in an amount exceeding RM20,000 — cl 12.2.(1); and

(6) 'open or close any bank accounts' of AHCM and JLLP — cl 12.2.(r);

(ii) both AHCM's PA and SD4's PA provide for, among others, the appointment of SAP or SAP's nominee as the attorney for AHCM and SD4 to, among others, vote at all meetings of directors and shareholders of AHCM; and

(iii) SD4's resignation letter, AHCM's resolutions to appoint directors, AHCM's resolution to appoint corporate representative, AHCM's share transfer form and SD4's share transfer form show that SAP controls AHCM's board of directors and shareholding.

[71] I am of the view that AHCM documents, especially SAP loan agreement, should have been disclosed to the Board in JLLP's letter dated 18 February 2014 (signed by SD4 on JLLP's behalf). JLLP and SD4 had therefore concealed AHCM documents from the Board.

[72] As SD4 had signed SAP loan agreement (as AHCM's director) and JLLP's letter dated 18 February 2014 (on behalf of JLLP), I find as a fact that SD4 had committed or contributed to JLLP's breach within the meaning of s 23(4A)(d) of the then VAEA.

K. TORT OF PASSING OFF

[73] Malaysian case law has applied the following three tests to decide whether a tort of passing off has been committed or not ('three tests'):

(a) Lord Diplock's test in the House of Lords case of *Erven Warnink Besloten Vennootschap And Another v J Townend & Sons (hull) Ltd And Another* [1979] AC 731 ('Lord Diplock's test') has been accepted by our apex courts as follows:

(i) the majority judgment of the Supreme Court delivered by Gunn Chit Tuan CJ (Malaya) in *Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 MLJ 770 at pp 781–782; [1994] 3 CLJ 7 at p 15; and

(ii) the decision of Richard Malanjum CJ (Sabah and Sarawak) in the Federal Court case of *Maestro Swiss Chocolate Sdn Bhd & Ors v Chocosuisse Union Des Fabricants Suisses De Chocolat (a co-operative society formed under title XXIX of the Swiss Code of Obligations) & Ors and another appeal* [2016] 2 MLJ 359 at paras 41–44; and

(b) the majority decision in *Seet Chuan Seng* and *Maestro Swiss Chocolate* (at para 45) have also affirmed Lord Fraser's test as laid down in *Erven Warnink* ('Lord Fraser's test'); and

(c) Nik Hashim JCA (as he then was) in the Court of Appeal case of *Sinma Medical Products (M) Sdn Bhd v Yomeishu Seizo Co Ltd & Ors* [2004] 4 MLJ 358; [2004] 3 CLJ 815 at para 33, has applied Lord Oliver's test in the House of Lords in *Reckitt and Colman Products Ltd v Borden Inc and others* [1990] 1 All ER 873 at p 880 ('Lord Oliver's test').

K(1). Whether SSSB has goodwill in its business regarding JLW marks

[74] The three tests require a plaintiff in a passing off action based on a mark or get-up to prove that the plaintiff enjoys goodwill in the business regarding the mark or get-up.

[75] Goodwill has been described by Lord MacNaghten in the House of Lords case of *The Commissioners of Inland Revenue v Muller & Co's Margarine, Limited* [1901] AC 217 at pp 223–224, as an 'attractive force which brings in custom'.

[76] The following cases have explained the requirement of goodwill for the purpose of a passing off suit:

(a) in an appeal to the Privy Council from Singapore, *Star Industrial Company Ltd v Yap Kwee Kor Trading As New Star Industrial Company* [1976] 1 MLJ 149 at pp 154–155, Lord Diplock held as follows:

> *Whatever doubts there may have previously been as to the legal nature of the rights which were entitled to protection by an action for 'passing-off' in courts of law or equity, these were laid to rest more than sixty years ago by the speech of Lord Parker of Waddington in AG Spalding & Bros v AW Gamage Ltd* (1915) 32 RPG 284 *('the Gamage case') with which the other members of the House of Lords agreed. A passing-off action is a remedy for the invasion of a right of property not in the mark, name or get-up improperly used, but in the business or goodwill likely to be injured by the misrepresentation made by passing-off one person's goods as the goods of another. Goodwill, as the subject of proprietary rights, is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached. It is local in character and divisible; if the business is carried on in several countries a separate goodwill attaches to it in each. So when the business is abandoned in one country in which it has acquired a goodwill the goodwill in that country perishes with it although the business may continue to be carried on in other countries (see: Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 *Lord Macnaghten* at p 224 *per Lord Lindley* at p 235). *Once the Hong Kong company had abandoned that part of its former business that consisted in manufacturing tooth-brushes for export to and sale in Singapore it ceased to have any proprietary right in Singapore which was entitled to protection in any action for passing-off brought in the courts of that country.* (Emphasis added.)

Based on *Star Industrial*:

(i) to sue for the tort of passing off based on a mark, a plaintiff has to prove ownership of goodwill attached to the business with regard to that mark. The plaintiff need not prove that the plaintiff owns the mark. As such, the ownership of JLW Marks does not confer the right to sue for the tort of passing off; and

(ii) goodwill is divisible in the sense that:

(1) one party may own goodwill attached to the business regarding a mark in a particular country; and

(2) goodwill in respect of the same business concerning the same mark in another country may be owned by another party; and

(b) *Star Industrial* has been affirmed in the following cases:

(i) the judgment of Lord Neuberger P in UK's Supreme Court in *Starbucks (HK) Ltd and another v British Sky Broadcasting Group plc and others* [2015] 3 All ER 469 at paras 23, 48 and 52–53; and

(ii) the following decisions of the Singapore Court of Appeal:

(1) LP Thean JA's judgment in *CDL Hotels International Ltd v Pontiac Marina Pte Ltd* [1998] 2 SLR 550 at para 50; and

(2) Sundaresh Menon CJ's decisions in *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc and another and another appeal* [2014] 1 SLR 911 at paras 134–136, and *Guy Neale and others v Ku De Ta SG Pte Ltd* [2015] 4 SLR 283 at paras 134–136.

[77] As explained in the above Part 1(1), with the introduction of s 23 of the then VAA on 6 February 1981:

(a) the Malaysian firm cannot lawfully offer services in Malaysia as registered valuers/appraisers based on JLW marks. Accordingly, based on cases from UK and Singapore as elaborated in the above para 76, with the enforcement of s 23 of the VAA, the Malaysian firm could not have any goodwill attached to the business of registered valuers/appraisers with regard to JLW marks; and

(b) in place of the Malaysian firm, SSSB was specifically incorporated to provide services in this country as registered valuers/appraisers based on JLW marks. All the interest in the Malaysian firm was then sold to SSSB. Thereafter, SSSB carries on business of registered valuers/appraisers in Malaysia and generates goodwill attached to its business regarding JLW Marks.

[78] When Act A598 came into force on 7 September 1984, only SSSB (not the London Proprietors, Pacific Proprietors, JLWP or JLWL) can lawfully provide services in Malaysia as registered estate agents with the use of JLW Marks. Thereafter, SSSB carries on real estate business in Malaysia by the use of JLW marks and creates goodwill attached to such a business.

[79] Based on the reasons explained in the above paras 77–78, SSSB is the owner of goodwill in its real estate business regarding the use of JLW marks ('SSSB's goodwill'). The London Proprietors, Pacific Proprietors, JLWP and JLWL are prohibited by s 23 of the then VAEA from providing real estate services based on JLW Marks in Malaysia and cannot therefore claim any goodwill in any real estate business with respect to JLW marks. SSSB's ownership of goodwill in its real estate business based on JLW marks is proven by the following evidence:

(a) SSSB has adduced documentary evidence regarding its expenditure in promoting JLW marks in this country;

(b) SSSB has won various awards for its real estate services based on JLW marks. In fact, SSSB has been awarded 'The Brand Laureate Award for Best Brand in Real Estate Advisory Services' for ten consecutive years from the inception of the award in 2006/2007–2015/2016;

(c) documentary evidence has been adduced regarding SSSB's talks concerning its real estate services under JLW marks which have been given at various conferences, seminars, dialogues and forums. I refer to SSSB's presentation dated 21 May 2010 with Jones Lang Wootton composite mark and the words 'Proprietor: [SSSB]' below the mark;

(d) there are newspaper articles and reports relating to SSSB's real estate business under JLW marks;

(e) SSSB's clients include the Malaysian government, Bank Negara Malaysia, almost all the banks and financial institutions in the country, public and private companies (both Malaysian and foreign) and individuals;

(f) SSSB has given a long list of public listed companies in Malaysia which have appointed SSSB to undertake valuations of real property and development projects;

(g) SSSB is a member of panel of valuers of various banks in Malaysia; and

(h) SSSB's property report has been produced since 1991 and is subscribed by about 50 clients of SSSB. From 2009, SSSB has produced a weekly property report, 'In The News' for its clients without the need for subscription.

[80] There is another reason the defendants ('first suit') cannot deny SSSB's goodwill — the defendants ('first suit') are estopped from doing so (please see Part N below).

[81] Ms Chew has submitted that any goodwill generated by the use of a mark by a licensee shall accrue to the licensor. The following cases have been cited in support of such a contention:

(a) the decision of Low Hop Bing J (as he then was) in the High Court in *Lam Soon (M) Bhd v Forward Supreme Sdn Bhd & Ors* [2001] 6 MLJ 651;

(b) Azizah Nawawi J's judgment in the High Court case of *Colliers International Property Consultants Inc v Colliers International Property Consultants Sdn Bhd* [2015] MLJU 2348; [2015] 1 LNS 252; and

(c) the English Court of Appeal case of *Scandecor Development AB v Scandecor Marketing AB and another* [1998] All ER (D) 370; [1999] FSR 26.

[82] I am of the following view regarding *Lam Soon*, *Colliers International Property Consultants* and *Scandecor Development*:

(a) the licensor of the device mark in *Lam Soon* was not prohibited by law from carrying on business and could therefore enjoy the goodwill generated by the exclusive licensee's use of the mark. In the instant matter, the Malaysian firm was prohibited by the then s 23 of the VAA from practising as registered valuers/appraisers and was therefore barred from enjoying any goodwill created subsequently by SSSB;

(b) no issue regarding s 23 of the VAEA had been raised in *Colliers International Property Consultants*;

(c) the Court of Appeal's decision in *Scandecor Development* should be read with caution because on appeal, *Scandecor Development AB v Scandecor Marketing AB and others* [2001] All ER (D) 29 (Apr), the House of Lords referred certain questions to the European Court of Justice on the meaning and effect of the Council of the European Union's Directive No 89/104/EEC ('EEC directive'). The UK's Trade Marks Act 1994 was enacted to implement the EEC Directive. Furthermore, *Scandecor Development* did not involve any illegality which bars the conduct of business and enjoyment of goodwill attached to the business; and

(d) the material facts of all the cases cited by Ms Chew did not:

(i) involve a licensee's proprietary interest in the mark in question — please see Part M below; and/or

(ii) concern an application of the equitable estoppel doctrine as explained in Part N below.

K(2). Have the defendants (first suit) misrepresented their business based on Jones Lang LaSalle name?

[83] A defendant misrepresents the defendant's mark in respect of the defendant's goods/services if the use of the defendant's mark is likely to deceive or confuse the public between the goods/services of the defendant and plaintiff ('likelihood of deception/confusion') — please see *Sinma Medical Products*, at para 37. A plaintiff in a passing off action is not required to prove that the public is actually deceived or confused between the goods/services of the plaintiff and defendant — *Sinma Medical Products* at para 37.

[84] I am of the view that there is a likelihood of deception/confusion between Jones Lang Wootton name and Jones Lang name on the one part and Jones Lang LaSalle name on the other part. This decision is based on the following reasons:

(a) SSSB and the defendants (first suit) are in the same real estate business except that SSSB also provides valuation services. As such, the clients and prospective clients of SSSB and the defendants (first suit) are similar and would likely to be deceived or confused:

(i) between Jones Lang Wootton name and Jones Lang LaSalle name; and

(ii) between Jones Lang name and Jones Lang LaSalle name;

(b) a visual comparison shows the following:

(i) there are two striking similarities between Jones Lang Wootton name mark and Jones Lang LaSalle name mark — the first two names ('Jones' and 'Lang') in both marks are identical and are in the same sequence ('two striking similarities'); and

(ii) as between Jones Lang name and Jones Lang LaSalle name, the likelihood of deception/confusion is higher. This is because in addition to the two striking similarities, a reasonable consumer of real estate services is likely to be deceived or confused into believing that Jones Lang name is an abbreviation for Jones Lang LaSalle name; and

(c) a pronunciation of:

(i) Jones Lang Wootton name and Jones Lang LaSalle name sounds alike as the first two names in both marks are identical. Admittedly, the last name of both marks are different but when the first two

names are pronounced, a likelihood of deception/confusion will arise; and

(ii) Jones Lang name and Jones Lang LaSalle name shows a high likelihood of deception/confusion. This is because firstly, the pronunciation of 'Jones' and 'Lang' in both marks is the same. Secondly, when a reasonable consumer of real estate services hears both marks, especially the first two names, he or she is likely to be deceived or confused into believing that Jones Lang name is an abbreviation for Jones Lang LaSalle name.

[85] In addition to the likelihood of deception/confusion, I find as a fact that APM has misrepresented its real estate business by using Jones Lang LaSalle name as follows:

(a) APM's profile stated, among others, that APM:

(i) followed 'Jones Lang LaSalle's operating and management procedures'; and

(ii) was 'an integral part of the Jones Lang LaSal/e's Asia Pacific operations'; and

(b) APM's 'Proposal for Project Management Services, Malaysia, October 2012' has used Jones Lang LaSalle composite mark and has stated in its introduction, among others, as follows:

> *Jones Lang LaSalle, Malaysia is pleased to present this proposal for Project Management Services to your company in respect to your Malaysian real estate needs*. (Emphasis added.)

[86] Ms Chew has contended that the defendants (first suit) have not committed any misrepresentation by their use of Jones Lang LaSalle name simply because the defendants (first suit) are in fact part of JLL Group (with JLL Inc as its holding company). I am unable to accede to this submission. As explained in the above para 84, there is a likelihood of deception/confusion. SSSB has used JLW Marks and SSSB's goodwill has been acquired much earlier than the use of JLL mark by the defendants (first suit). Even if it is true that the defendants (first suit) are in fact part of JLL Group, the burden is on the defendants (first suit) to conduct their real estate business in such a manner so as not to cause a likelihood of deception/confusion. I rely on Lord Jauncey's judgment in *Reckitt & Colman Products* at p 894, as follows:

> My Lords, if I had been asked to express my views on this matter without the aid of able argument and copious citation of authority but guided by common sense, *I should have stated the following propositions.*
>
> (c) *Where trader A enters the market to compete with trader B whose goods have acquired a reputation and are identified by a particular get-up it will be a question of degree to*

what extent trader A must differentiate his get-up from that of trader B in order to avoid deception. If B's goods have been in the market for a relatively short time with a get-up which is not particularly distinctive, the steps required to differentiate may not be very substantial. If, on the other hand, those goods have been in the market for a long time with a particularly distinctive get-up then A, seeking to market his goods with a similar get-up, will require to take far more drastic steps to inform the public that his goods are not those of B, since the public, having long become used to such a get-up as identifying the goods of 8, are likely to be less mindful of differences in detail. (Emphasis added.)

[87] In view of the above evidence and reasons, I have no hesitation to find that the defendants (first suit), by their use of Jones Lang LaSalle name, have misrepresented their business as that of SSSB's ('misrepresentation by the defendants (first suit)').

K(3). Have the defendants (first suit) misrepresented their business based on JLL mark?

[88] I find as a fact that there is no likelihood of deception/confusion between JLW Marks and JLL mark. This decision is based on the following reasons:

(a) a visual comparison between Jones Lang Wootton name and Jones Lang name on the one part and JLL mark on the other part, does not show any similarity, let alone a similarity which is deceptive or confusing;

(b) when JLW mark is visually compared with JLL mark, there is no likelihood of deception/confusion because the third alphabet in both marks are different. I am not persuaded by the fact that the similarity of the first two alphabets in JLW and JLL marks, is likely to deceive or confuse a reasonable consumer of real estate services. Due to the nature and high cost of real estate services, a consumer of real estate services is probably more discerning than a customer of consumer goods who buys goods off the shelf; and

(c) a pronunciation of:

(i) Jones Lang Wootton name, Jones Lang name and JLW mark on the one part; and

(ii) JLL mark on the other part,

— does not indicate any likelihood of deception/confusion.

[89] The above decision concerning JLL mark is supported by the fact that if there is a likelihood of deception/confusion between JLW Marks and JLL mark, SSSB would have applied to court to remove JLL registered trademarks from the register pursuant to s 45(1)(a) of the TMA. Furthermore, on 9 October 2017, Ms Chew informed the court that the defendants (first suit)

have a license from JLL IP Inc to use JLL registered trademarks ('JLL IP Inc's license'). Ms Chew further undertook to produce JLL IP Inc's license within two weeks from 9 October 2017. In view of JLL IP Inc's license, the defendants (first suit) have a right to use JLL registered trademarks. Accordingly, the defendants (first suit) have not misrepresented their business as that of SSSB's by the use of JLL mark.

K(4). Has SSSB proven likelihood of damage?

[90] A plaintiff in a passing off action is only required to prove a probability or likelihood of damage to the goodwill attached to the plaintiff's business which has been caused by the defendant's misrepresentation ('likelihood of damage') — please see Abdul Malik Ishak JCA's judgment in the Court of Appeal case of *Yong Sze Fun & Anor (t/a Perindustrian Makanan & Minuman Layang-Layang) v Syarikat Zamani Hj Tamin Sdn Bhd & Anor* [2012] 1 MLJ 585 at para 240.

[91] I am satisfied that SSSB has proven a likelihood of damage to SSSB's goodwill caused by misrepresentation by defendants (first suit). This finding is based on the following evidence and reasons:

(a) as decided in *Seet Chuan Seng* at p 15, if the goods in question are in direct competition with one another, the court will readily infer a likelihood of damage to the plaintiff's goodwill through loss of sales and loss of exclusive use of the plaintiff's trade name. In this case, SSSB and the defendants (first suit) are business competitors. Consequently, there is a likelihood of damage to SSSB's goodwill caused by the misrepresentation by defendants (first suit) in the form of:

(i) loss of real estate business; and

(ii) loss of SSSB's exclusive use of JLW marks;

(b) there is a likelihood that SSSB's goodwill is damaged by a dilution of JLW marks to SSSB's detriment — please see Abdul Hamid Mohamad J's (as he then was) decision in the High Court in *The Scotch Whisky Association & Anor v Ewein Winery (M) Sdn Bhd* [1999] 6 MLJ 280 at p 303; and

(c) the misrepresentation by the defendants (first suit) will prevent SSSB from controlling the reputation to which SSSB's goodwill is associated with JLW marks — please see Falconer J's (as he then was) judgment in the English High Court case of *Lego Systems A/S v Lego M Lemelstrich* [1983] FSR 155 at pp 190–191.

K(5). Whether three tests have been fulfilled

[92] Based on the evidence and reasons elaborated in the above Parts K(1)–(4), I am satisfied that SSSB has satisfied the three tests and the defendants (first suit) have therefore passed off their real estate services as SSSB's business by the use of Jones Lang LaSalle name (not by the use of JLL mark). My application of the three tests is as follows:

(a) based on Lord Diplock's test:

(i) the misrepresentation by the defendants (first suit) has been proven — please see the above Part K(2);

(ii) the misrepresentation by the defendants (first suit) has been made in the course of business;

(iii) the misrepresentation by the defendants (first suit) has been made to prospective or ultimate clients of real estate services;

(iv) the misrepresentation by the defendants (first suit) is calculated to injure SSSB's goodwill in the sense that this is a reasonably foreseeable consequence; and

(v) the misrepresentation by the defendants (first suit) will probably cause damage to SSSB's gsoodwill — please see the above Part K(4);

(b) applying Lord Fraser's test:

(i) SSSB's business includes the provision of real estate services to which JLW marks apply;

(ii) SSSB's real estate services is a class of services which is clearly defined in the minds of the Malaysian public and JLW marks distinguish SSSB's real estate services from other real estate services;

(iii) because of the reputation of SSSB's real estate services, there exists SSSB's goodwill — please see the above Part K(1);

(iv) SSSB is the owner of SSSB's goodwill in Malaysia which is of substantial value — please see the above Part K(1); and

(v) SSSB is really likely to suffer substantial damage to SSSB's goodwill by reason of the misrepresentation by the defendants (first suit) — please see the above Part K(4); and

(c) premised on Lord Oliver's test:

(i) SSSB's goodwill has been proven — please see the above Part K(1);

(ii) the misrepresentation by the defendants (first suit) has been committed — please see the above Part K(2); and

(iii) SSSB has proven that SSSB is likely to suffer damage by reason of the misrepresentation by the defendants (first suit) — please see the above Part K(4).

L. WHETHER ILLEGALITY WOULD DEPRIVE THE DEFENDANTS (FIRST SUIT) FROM DEFENDING THEMSELVES AGAINST SSSB'S CLAIM

[93] Dato' Seri Gopal has contended that public policy requires the court to reject the defence of the defendants (first suit) against SSSB's claim because they have breached s 23 of the then VAEA ('illegality').

[94] Firstly, all the cases cited by SSSB concerned the operation of public policy to dismiss claims by parties who have committed an illegal act. My research is not able to reveal any case which has rejected a defence in a claim merely because the defendant is a party to an illegality. I am of the view that illegality does not deprive the defendants (first suit) of their right to defend themselves against SSSB's claim. My opinion is premised on the following reasons:

(a) under art 8(1) of the Federal Constitution ('the Constitution'), all litigants, including a defendant, has a constitutional right of equality before the law and are entitled to equal protection of the law. Such a constitutional right includes a right of the defendant to oppose a claim on its merits. This right cannot be denied merely because a defendant has committed an illegality;

(b) SSSB has the legal burden under s 101(1) and (2) of the EA to prove SSSB's claim. This burden cannot be discharged by the illegality; and

(c) if a defence is rejected merely because the defendant is involved in an illegality, this may unjustly enriched the plaintiff and may financially wreck the defendant in an unjust manner.

M. WHETHER SSSB HAS A PROPRIETARY INTEREST IN JONES LANG WOOTTON NAME AND JLW MARK

[95] I am of the following view regarding cl 6 sublicence (1993):

(1) sublicence (1993), as a commercial contract, should be construed in a commercially sensible manner — please see the Federal Court's judgment in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at para 10. An objective interpretation of cl 6 sublicence (1993) in a commercially sensible manner, clearly shows the manifest intention of JLWP to confer a proprietary interest on SSSB in Jones Lang Wootton name and JLW mark ('SSSB's proprietary interest');

(2) I am unable to accept the submission by the defendants (two cases) that cl 6 sublicence (1993) only imposes a mere contractual obligation on JLWP to 'endeavor to ensure' a new deed of sublicence on no less favourable terms for SSSB in the event of a termination or non-renewal of sublicence (1993). If I have acceded to such a submission, cl 6 sublicence (1993) is not given a commercially sensible construction;

(3) cl 14 of the sublicence (1993) states that the sublicence (1993) 'shall' bind the 'assigns' of JLWP ('cl 14 (sublicence (1993)'). The London proprietors have, among others, assigned all IP rights in Jones Lang Wootton name and JLW mark to JLWL. Accordingly, JLWL is bound by SSSB's proprietary interest;

(4) the defendants (two cases) are not parties to the sublicence (1993). However, as explained in the above para 60, the court has lifted the corporate veil of all the relevant JLL companies to reveal that, among others, the defendants (two cases) and JLWP act as one entity (JLL Group). This is supported by JLLPC's termination notice which stated that 'We will be reviewing the (sublicence (1993))'. If all the relevant JLL companies did not act as a single entity, JLLPC (which is not a party to the sublicence (1993)) would not have referred to the sublicence (1993) in JLLPC's termination notice. Accordingly, all the relevant JLL companies, including the defendants (two cases), are bound by SSSB's proprietary interest; and

(5) all the parties in the two cases have agreed in paras 10 and 23 of the agreed facts that the sublicence (1993) is still valid. Such a fact is also impliedly admitted in JLLPC's termination notice. Even if JLWL subsequently terminates the sublicence (1993) for any reason, SSSB's proprietary interest is still valid and enforceable.

[96] Clause 13 of the sublicence (1993) provides that the sublicence (1993) 'represents the whole agreement and arrangement between the parties and entirely supersedes all prior written agreements and arrangements made between them' ('cl 13 sublicence (1993)'). I am of the following view regarding cl 13 sublicence (1993):

(1) the first part of cl 13 sublicence (1993) has the effect of an 'entire agreement clause'. In the Court of Appeal case of *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585 at pp 593–594; [2005] 2 CLJ 596 at p 607, Nik Hashim JCA (as he then was) held that the effect of an entire agreement clause is that the agreement in question 'constitutes a binding agreement between (the parties) with regard to all matters mentioned in the contract and ... the contract does not permit any term to be implied or import any other considerations not in the contract'; and

(2) the second part of cl 13 sublicence (1993) has expressly provided that the sublicence (1993) supercedes all agreements and arrangements regarding the right to use Jones Lang Wootton name and JLW mark. As elaborated in the above para 60, the court has lifted the corporate veil of all the relevant JLL companies to reveal that, among others, the defendants (two cases) and JLWP act as one entity (JLL Group). It is therefore clear that the defendants (two cases) are bound by cl 13 sublicence (1993) and cannot rely on the following contracts and instruments against SSSB:

(a) SPA (1974);

(b) partnership agreement (1977) and PA (1977);

(c) partnership agreement (1979) and PA (1979);

(d) first SPA (1982);

(e) second SPA (1982);

(f) sublicence (1982); and

(g) covenant (1982).

N. WHETHER EQUITABLE ESTOPPEL DOCTRINE APPLIES

[97] SSSB and the defendants (two cases) have relied on the equitable estoppel doctrine.

[98] In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at pp 344–345; [1995] 4 CLJ 283 at p 295, the Federal Court has decided that a plaintiff may rely on the equitable estoppel doctrine to support his or her cause of action.

[99] I find that there is no evidence to invoke the equitable estoppel doctrine against SSSB. To the contrary, the following evidence and reasons support the finding that the defendants (two cases) and all relevant JLL companies are estopped from denying SSSB's goodwill:

(a) in Part 2.0 (History) of the GOF, it was stated that, among others, 'To conform with [VAEA], contracts between the Pacific Proprietors ... and [SSSB] were executed giving [SSSB] exclusive rights to the income derived from all property services related to real estate in Malaysia. These contracts are binding in perpetuity upon successors of the Pacific Proprietors ... now JLL' ('Admission (GOF)');

(b) as explained in the above para 59, JLLPC (party to the GOF) is the alter ego of the defendants (first suit). Accordingly, the defendants (first suit) are bound by the admission (GOF) and are estopped from denying SSSB's goodwill; and

(c) due to the reasons explained in the above para 60, the court has lifted the corporate veil of all the relevant JLL companies to reveal that, among others, the defendants (two cases) act as one entity (JLL Group). Accordingly, the defendants (two cases) are estopped by the admission (GOF) from denying SSSB's goodwill.

[100] The defendants (two cases) and all relevant JLL companies are estopped from denying SSSB's proprietary interest. This decision is premised on the following evidence and reasons:

(a) SSSB has openly stated in all its letters, reports and documents that it is the proprietor of Jones Lang Wootton composite mark (subsequently Jones Lang Wootton registered trademark). There is no objection or protest by the defendants (two cases) or any one of the relevant JLL companies against SSSB's claim of ownership to Jones Lang Wootton composite mark and Jones Lang Wootton registered trademark;

(b) JLL IP Inc did not file any objection to SSSB's trademark application. It is to be noted that JLL IP Inc was legally represented at the material time and had the benefit of legal counsel. Nor did JLL IP Inc object to the renewal of the registration of Jones Lang Wootton registered trademark. As explained in the above para 60, all the relevant JLL companies (including JLL IP Inc) act as one entity. As such, all the relevant JLL companies, including the defendants (two cases), are estopped by JLL IP Inc's above conduct from denying SSSB's proprietary interest; and

(c) since 2014, JLL Group (which includes the defendants (two cases)) has stopped using Jones Lang LaSalle name and has only used JLL name, JLL composite mark and JLL registered trademarks. The registrations of Jones Lang Wootton registered trademarks (other countries) were allowed by the JLL Group to expire. Accordingly, the conduct of JLL Group (including defendants (two cases)) estops them from denying SSSB's proprietary interest.

O. DOES SSSB'S CLAIM CONSTITUTE A TORT OF ABUSE OF COURT PROCESS?

[101] As explained in the above Parts K(1)–(5), the defendants (first suit) have committed the tort of passing off their real estate business as that of SSSB. Accordingly, SSSB's claim cannot constitute an abuse of court process, much less give rise to liability on SSSB's part to the defendants (first suit) for the tort of abuse of court process.

P. HAS SSSB COMMITTED TORT OF PASSING OFF?

[102] I am not persuaded that SSSB has passed off its real estate services as being associated with the services provided by JLL Group. This is because firstly, there is no evidence on a balance of probabilities that SSSB has misrepresented to the public that its real estate services is associated with JLL Group's business.

[103] Secondly, I am of the view that JLLP's counterclaim is an afterthought which has been filed to stifle SSSB's claim. This view is based on the fact that JLLP did not serve any demand on SSSB to cease and desist from misrepresenting SSSB as being associated with JLL Group.

[104] In any event, even if JLLP's counterclaim has any basis, I accept Dato' Seri Gopal's submission that due to public policy, the court will not come to the aid of JLLP in view of the illegality — please see the opinion of the Privy Council delivered by Lord Denning in *Palaniappa Chettiar v Arunasalam Chettiar* [1962] 1 MLJ 143 at p 146, an appeal from Malaysia.

Q. THE SECOND SUIT

Q(1). Is JLWL aggrieved by SSSB's registered trademark?

[105] A person can only apply to court under s 45(1)(a) of the TMA to expunge a registered trademark from the Register if the person is 'aggrieved' by the registered trademark. In *Doretti Resources Sdn Bhd v Fitters Marketing Sdn Bhd & Ors* [2017] MLJU 836; [2017] 5 MLRH 1 at para 28, I have followed Federal Court decisions regarding the meaning of an aggrieved person under s 45(1)(a) of the TMA:

> 28. *In deciding whether the three companies are aggrieved by the registered mark under* s 45(1)(a) of the TMA, *I am bound by the following two tests laid down by the Federal Court*:
>
> (a) in *McLaren International Ltd v Lim Yat Meen* [2007] 7 MLJ 581, at para 22, Abdul Aziz FCJ has decided as follows:
>
> > [22] *We understand that passage as laying down the principle that a person aggrieved is a person who has used his mark as a trademark — or who has a genuine and present intention to use his mark as a trademark — in the course of a trade which is the same as or similar to the trade of the owner of the registered trademark that the person wants to have removed from the register.* (Emphasis added.)
>
> *The above two limbs of the meaning of aggrieved person in McLaren International has been affirmed by the Federal Court in*:
>
> (i) the judgment of Zulkefli CJ (Malaya) in *LB (Lian Bee) Confectionery Sdn Bhd v QAF Ltd* [2012] 4 MLJ 20 at para 14;

(ii) Azahar Mohamed FCJ's decision in *Mesuma Sports Sdn Bhd v Majlis Sukan Negara Malaysia (Pendaftar Cap Dagangan Malaysia, interested party)* [2015] 6 MLJ 465 at para 28; and

(iii) Balia Yusof FCJ's judgment in *Liwayway Marketing Corp v Oishi Group Public Co Ltd* [2017] 4 MLJ 141; [2017] 5 CLJ 133 at para 11; and

(b) Azahar Mohamed FCJ held as follows in *Mesuma Sports*, at para 28:

> [28] ... *The person must be someone who has some element of legal interest, right or legitimate expectation in its own mark which is being substantially affected by the presence of the registered trademark. The interest and right must be legal or lawful.* (Emphasis added.)

The above meaning of aggrieved person in *Mesuma Sports* has been approved in *Liwayway Marketing Corp* at para 13. (Emphasis added.)

[106] It is clear that JLWL is not aggrieved by Jones Lang Wootton registered trademark because:

(a) JLWL is a non-registered person and is prohibited by s 23 of the then VAEA from providing any real estate services ('prohibition'). Hence, JLWL cannot use Jones Lang Wootton registered trademark or have a 'genuine and present intention' to use that mark within the meaning of both limbs of *McLaren International*;

(b) in view of the prohibition, it cannot be said that JLWL has an 'element of legal interest, right or legitimate expectation' which is adversely affected by Jones Lang Wootton registered trademark as explained in *Mesuma Sports*;

(c) as explained in the above sub-para 95(3), JLWL is bound by SSSB's proprietary interest by virtue of cl 14 sublicence (1993);

(d) there is no evidence of actual 'use' of Jones Lang Wootton registered trademark by JLWL in Malaysia within the meaning of s 3(2)(a) and (c) of the TMA — please see *Hyundai Motor Company v Sun Yuen Rubber Manufacturing Co Sdn Bhd* [2017] MLJU 700 at paras 49–50. Section 3(2)(a) and (c) of the TMA provides as follows:

> 3(2) In this Act —
>
> (a) *references to the use of a mark shall be construed as references to the use of a printed or other visual representation of the mark;*
>
> (b) *references to the use of a mark in relation to services shall be construed as references to the use thereof as a statement or as part of a statement about the availability or performance of services.* (Emphasis added.)

since 2014, JLL Group (including JLWL) has stopped using Jones Lang LaSalle name and has only used JLL name, JLL composite mark

and JLL registered trademarks. Jones Lang Wootton registered trademarks (other countries) have also been allowed to expire or be cancelled. In such circumstances, JLWL cannot be aggrieved by Jones Lang Wootton registered trademark.

Q(2). Whether Jones Lang Wootton registered trademark had been obtained by fraud

[107] I will now proceed to decide on the merits of the second suit on the assumption that JLWL has been aggrieved by Jones Lang Wootton registered trademark.

[108] According to s 36 of the TMA, the fact that SSSB is registered as the proprietor of Jones Lang Wootton registered trademark shall be prima facie evidence of the validity of the original registration of Jones Lang Wootton registered trademark. More importantly, SSSB can rely on s 37 of the TMA which provides that Jones Lang Wootton registered trademark shall be conclusive after the expiry of seven years from the date of its original registration unless one of the three circumstances pursuant to s 37(a)–(c) of the TMA, can be proven by JLWL.

[109] JLWL has relied on s 37(a) of the TMA, namely the original registration of Jones Lang Wootton registered trademark has been obtained by fraud on the Registrar.

[110] This court cannot expunge Jones Lang Wootton registered trademark pursuant to s 37(a) of the TMA because of the existence of SSSB's proprietary interest — please see the above Part M. Furthermore, as explained in the above para 100, JLL Group (including JLWL) is estopped from denying the existence of SSSB's proprietary interest.

[111] I have not overlooked JLWL's submission based on, among others, the Federal Court's judgment in *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166; [2015] 4 CLJ 20. *Ho Tack Sien* has decided that if a ground to remove a registered trademark has been proven under s 37(a)–(c) of the TMA, the court has no discretion but to remove the registered trademark and estoppel cannot bar such a removal. In this case, as explained in the above para 110, JLWL has failed to prove fraud under s 37(a) of the TMA so as to expunge Jones Lang Wootton registered trademark. As such, JLWL cannot rely on *Ho Tack Sien* to support the second suit.

R. SHOULD COURT CERTIFY FEES FOR TWO COUNSEL? A

[112] SSSB's solicitors served a bill of costs consisting of the following items:

(a) getting up fee of RM500,000;

(b) certified fee for two counsel of RM1,350,000; and B

(c) out of pocket expenses ('OPE').

[113] Ms Elaine Yap firstly objected to the certified fee for two counsel on the ground that the two cases did not require the services of two counsel. Ms Yap C further submitted that the getting up fee was excessive.

[114] Order 59 rr 8(b) and 14(1) of the RC provides as follows:

> r 8 The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account — D
>
> ...
>
> (b) *the conduct of all the patties, including conduct before and during the proceedings;* ...
>
> r 14(1) *The fees for more than one counsel for one patty or set of defendants shall not be allowed unless the Court or Judge at the hearing so cettifies.* (Emphasis added.) E

[115] Regarding the court's power to certify fees for two counsel under O 59 r 14(1) of the RC, I am of the following view: F

(a) the court has a discretion pursuant to O 59 r 14(1) of the RC to certify fees for more than one counsel. The court's exercise of discretion is based on the particular facts of the case at hand and does not constitute a binding legal precedent from the view point of stare decisis doctrine; G

(b) I refer to Barwick CJ's judgment in the 4–1 majority decision of the High Court of Australia in *Stanley v Phillips* [1966] HCA 24; [1966] 115 CLR 470 at para 16, which decided that the court may allow fees for more than one counsel where the court is satisfied that 'the nature and circumstances of the case are such that the services of two counsel are required if the case is to be presented to the court in such a manner that justice can be done between the parties'. It is to be noted that the High Court of Australia is its apex court; and H

(c) the court should be wary in certifying fees for more than one counsel because as explained by Vincent Ng Kim Khoay J (as he then was) in the High Court in *Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors* [1995] 4 MLJ 764 at p 780; [1995] 4 CLJ 606, at pp 616–617, 'the process of litigation is solely to enable a litigant to have his rights litigated, rather than to permit him to acquire monetary gains'. Costs is not a remedy in I

A itself. Excessive costs amounts to an unjustifiable windfall and impedes a party's fundamental right of access to justice as provided in art 5(1) of the Constitution — please see the Federal Court's judgment in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 at pp 339–340; [2010] 3 CLJ 507 at pp 514–515.

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[116] The two cases raise novel issues regarding s 23 of the then VAEA and s 23 of the EA ('two novel questions'). Having said that, I accept Ms Elaine Yap's contention that the nature and circumstances of the two cases are such that the services of two counsel are not required for the two cases to be C presented to the court in such a manner that justice can be done between the parties — please see *Stanley.* Justice can be attained in the two cases with only one learned lead counsel for SSSB.

[117] I exercise my discretion under O 59 rr 8(b), 16(1), (2), (3) and 19(1) of D the RC to award a sum of RM300,000 as getting up fee (in addition to OPE). This exercise of discretion is based on the following considerations:

(a) costs is awarded in the two cases on a standard basis and not on an indemnity basis — please see O 59 r 16(2) and (3) of the RC;

E (b) two novel questions arise in this matter — please see O 59 r 16(1)(a) of the RC;

(c) the court takes into account the illegality perpetrated by the defendants (first suit) — please see O 59 r 8(b) of the RC (conduct of parties) and F *Dawama Sdn Bhd v Mohd Fadel bin Yusof & Ors* [2015] 7 MLJ 1 at para 25;

(d) JLLP had concealed AHCM documents from the Board (please see the above para 71). Furthermore, JLLP had strenuously objected to the s 165 application;

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(e) the skill, specialised knowledge and responsibility required of SSSB's learned lead counsel — please see O 59 r 16(1)(b) of the RC;

(f) the importance of the two cases to SSSB cannot be overstated — please see O 59 r 16(1)(e) of the RC; and

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(g) the two cases involved voluminous documents — please see O 59 r 16(1)(c) of the RC.

S. SUMMARY OF THE COURT'S DECISION

I

[118] Premised on the above evidence and reasons:

(a) SSSB's claim is allowed with costs;

(b) JLLP's cunterclaim is dismissed with costs; and

(c) the second suit is dismissed with costs.

[119] A summary of the above decision is as follows:

(a) SSSB's claim should be allowed against APM because due to APM's failure to adduce evidence in the first suit:

  (i) the court shall presume the evidence in support of SSSB's claim against APM to be true; and/or

  (ii) an adverse inference under s 114(g) of the EA is drawn against APM;

(b) the court exercises its discretion under the second limb of s 165 of the EA to order JLLP to produce AHCM documents which are relevant to the two cases;

(c) the email dated 14 October 2015 does not constitute an 'admission' under s 17(1) of the EA and its admissibility as evidence is therefore not barred by s 23 of the EA;

(d) the two conditions have been fulfilled for the court to lift the corporate veil to reveal that:

  (i) JLLPC is the alter ego of the defendants (two cases); and

  (ii) all the relevant JLL companies have acted as one entity (JLL Group) in the two cases;

(e) the defendants (first suit) have breached or have unlawfully circumvented s 23 of the VAEA as follows:

  (i) the defendants (first suit) are subsidiaries of JLL Inc; and/or

  (ii) the management and operation of AHCM, JLLP's holding company, is controlled by SAP (non-registered person);

(f) SSSB's goodwill has been acquired which entitles SSSB to sue the defendants (first suit) for the tort of passing off;

(g) a breach of s 23 of the VAEA by the defendants (first suit) would not deprive them of their right to defend themselves against SSSB's claim;

(h) the defendants (first suit) have passed off their real estate services as SSSB's business by the use of Jones Lang LaSalle name. The defendants (first suit) however have not committed the tort of passing off regarding the use of JLL mark;

(i) SSSB's proprietary interest in Jones Lang Wootton name and JLW mark:

(i) has been conferred by cl 6 sublicence (1993); and

(ii) binds JLL Group, including the defendants (two cases);

(j) the defendants (two cases) are estopped from denying SSSB's goodwill and SSSB's proprietary interest;

(k) SSSB's claim does not constitute an abuse of court process;

(l) JLLP's counterclaim is dismissed because:s

(i) SSSB has not misrepresented its real estate business as being associated with the services offered by JLL Group;

(ii) JLLP's counterclaim is an afterthought which is filed to stifle SSSB's claim; and

(iii) in view of the illegality, the court will not come to the aid of JLLP;

(m) the second suit is dismissed because:

(i) JLWL is not aggrieved by Jones Lang Wootton registered trademark within the meaning of s 45(1)(a) of the TMA; and/or

(ii) in view of, among others, SSSB's proprietary interest, Jones Lang Wootton registered trademark has not been registered by way of fraud on the Registrar; and

(n) the court declines to exercise its discretion under O 59 r 14(1) of the RC to certify fees for two counsel because the nature of the two cases are such that the services of two counsel are not required for the two cases to be presented to the court in a manner which can achieve justice between the parties.

[120] In closing, I wish to express my gratitude to Dato' Seri Gopal, Ms Chew and Ms Elaine Yap for their persuasive submission, without which this judgment is not possible.

Annexure A

Annexure B

JLL

Annexure C

JONES LANG LASALLE

SSSB's claim allowed and JLLP's counterclaim dismissed.

Reported by Afiq Mohamad Noor